Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1771

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners,

VS.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the District of Columbia Circuit

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Dated: June 9, 1977.

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VS.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit

Petitioners, the People of the State of California and the Public Utilities Commission of the State of California (California) pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on March 14, 1977.

OPINIONS BELOW

The judgment of the Court of Appeals is printed in Appendix A. The opinion of the Court of Appeals

is not yet reported and is printed in Appendix B. The Civil Aeronautics Board's (Board) Order 75-6-135, issued June 27, 1975, and its *Order on Reconsideration,* Order 75-9-78, issued September 22, 1975, in Application of Pacific Southwest Airlines (PSA) at the Board's Docket 27606 and Application of Air California (Air Cal) at the Board's Docket 27623, are not yet reported and are printed in Appendices C and D, respectively. The Board's Order 76-3-114, its *Order Granting Exemptions and Instituting Investigation,* issued March 16, 1976, is not yet reported, and is printed in Appendix E.

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 1977. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1) and Section 1006(f) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. Sec. 1486(f).

QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit properly affirmed orders of the Civil Aeronautics Board which restrict air service within California despite the Court of Appeals' recognition that there was no record, and thus no evidence to support these orders.

STATUTORY PROVISIONS

Involved are Sections 101(21), 101(22), 101(23) and 1006 of the Federal Aviation Act of 1958 as amended, 49 U.S.C. Sections 1301(21), 1301(22), 1301(23) and 1486. These provisions are set forth in Appendix F.

STATEMENT OF THE CASE

The Public Utilities Commission of the State of California (hereafter "California Commission") is the agency in the State of California charged with the responsibility, *inter alia,* of regulating transportation by air in common carriage within the State of California. Public Utilities Code of the State of California, Sections 2739, *et seq.*

By applications filed with the California Commission on February 6, 1975 and February 13, 1975, respectively, Air Cal and PSA sought authority pursuant to the provisions of the California Passenger Air Carriers Act, Public Utilities Code of the State of California Sections 2739, *et seq.,* for service between Tahoe Valley Airport, California (hereafter "Tahoe") and numerous other points in California.[1]

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[1]The application filed with the California Commission by Air Cal on February 6, 1975 sought certificate authority or, in the alternative, exemption from the certificate requirements, for its service between Tahoe on the one hand, and Los Angeles and San Jose, on the other with connecting service between Tahoe and San Diego, Palm Springs, Orange County (Santa Ana), Ontario and Oakland via San Jose. The amended application filed by PSA with the California Commission on February 13, 1975 sought authority to provide service between Tahoe and San Francisco both nonstop and via Sacramento, between Tahoe and San Jose, both nonstop and via Oakland, and nonstop service

On February 19, 1975, the California Commission granted 90-day exemption authority to both airlines for service to Tahoe, limited to flights utilizing Lockheed Electra aircraft.[2]

On March 11, 1975 and March 14, 1975, respectively, PSA and Air Cal filed applications with the Board requesting exemption authority pursuant to the provisions of Section 416 of the Federal Aviation Act of 1958, as amended. Both Air Cal's and PSA's applications sought authority from the Board which would enable them to hold out and advertise the availability of Nevada destinations in conjunction with their intrastate service between Tahoe, and other California points. PSA requested this authority without restrictions as to the size of aircraft that could be utilized. Air Cal agreed to restrict its service to Lockheed Electra aircraft. Both PSA and Air Cal

between Tahoe and Los Angeles International Airport with connecting service to and from all the other California points it was authorized to serve. Both air carriers requested that immediate exemptions be granted, due to the cessation of Holiday Airline service on February 5, 1975. Holiday provided the only airline service to Tahoe.

[2]In accordance with the California Commission's order, PSA was authorized to serve Tahoe from Los Angeles and Burbank, and Air Cal was authorized to serve Tahoe from San Jose and Oakland. These temporary certificates allow for "tacking" Tahoe flights with other intrastate flights. Thus PSA is authorized to serve Tahoe and San Diego via Los Angeles or Burbank and Air Cal is authorized to serve Lake Tahoe and San Francisco, Santa Ana, Ontario, Palm Springs and San Diego via San Jose or Oakland.

By order issued May 20, 1975, the California Commission extended both exemptions for an additional 90 days. The California Commission later issued temporary certificates pending the final determination of the proceeding before it. Both applications for permanent authority are pending before the California Commission.

requested essentially the same exemption authority which the Board previously granted to Air Nevada and Holiday Airlines in Order 74-1-134, as modified by Order 74-5-131.[3]

On June 27, 1975, the Board issued Order 75-6-135, granting limited exemptions from the certificate requirements of Title IV of the Federal Aviation Act of 1958, as amended, to PSA and Air Cal. The exemption authority granted to PSA was limited to service between Tahoe on the one hand, and Los Angeles and Burbank on the other. PSA's requested authority for service between Tahoe and San Diego was omitted. The exemption authority granted to Air Cal was limited to service between Tahoe and the Oakland and San Jose airports. Air Cal's requested authority for service between Tahoe and Ontario, Palm Springs, San Diego, San Francisco and Santa Ana was omitted. Both authorities were to expire on January 24, 1975.

Although no restrictions were placed on the size or type of planes that could be used, the Board imposed a number of other restrictions. Thus, Order 75-6-135 provided, in part, that:

> "No interline ticketing or baggage handling will be permitted nor may applicants publish connecting schedules in the Official Airline Guide or their own timetables beyond the named points or extend single-carrier service beyond the named

[3]Holiday Airlines had operated pursuant to the Board's exemption authority until service was terminated on February 5, 1975. Air Nevada had not instituted service. The exemption granted by the Board to Holiday and Air Nevada expired on January 24, 1976.

points by tacking or connecting Tahoe flights with their intrastate systems." (Order 75-6-135, Appendix C, p. 29).

The Board stated that such restrictions were necessary to maintain the intrastate status of the carriers involved because, in its view, ". . . air service at Lake Tahoe is interstate in nature by definition . . ." since ". . . more than a *de minimis* number of passengers moving by air between Lake Tahoe and other California points originate or terminate their journeys in Nevada . . ." (Order 75-6-135, Appendix C, pp. 29-30)[4]

On July 18, 1975, California filed a petition for reconsideration of Order 75-6-135 with the Board. In this filing, California took exception to the Board's finding that air service between Tahoe and other California points is interstate in nature, and to the Board's authorization of jet service by PSA without complying with the provisions of the National Environmental Policy Act, as amended. 42 U.S.C. Sec. 4321, et seq. Petitions for reconsideration of Order 75-6-135 were also filed by Western Air Lines, Air Cal, and the City and Chamber of Commerce of South Lake Tahoe.[5] The National Association of Regulatory Utility Commissioners (NARUC) supported Califor-

[4]In Order 76-3-114, both authorities were extended pending the outcome of the *Lake Tahoe Service Investigation* at the Board's Docket 29000 instituted by that same order.

[5]Air Cal's petition also sought a stay of Order 75-6-135, insofar as it directed Air Cal to discontinue publishing through plane and connecting schedules with its other intrastate flights. This stay was denied in Order 75-9-78.

nia's arguments in an answer filed with the Board on July 30, 1976.[6]

On September 22, 1975, the Board issued Order 75-9-78, its *Order on Reconsideration.* In Order 75-9-78, the Board modified the authority granted by Order 75-6-135, to limit its authorization to service utilizing Lockheed Electra aircraft, thus recognizing California's objection to the introduction of jet service in this highly sensitive environmental area. However, the Board rejected the assertions of error raised by California and supported by NARUC with respect to its finding that service between Tahoe and other California points is "interstate in nature by definition".

On November 6, 1975 and November 21, 1975 respectively, California and NARUC filed their petitions for review of the Board's Orders 75-6-135 and 75-9-78, with the United States Court of Appeals for the District of Columbia Circuit, at Dockets 75-2070 and 75-2133, respectively. By order dated January 7, 1976, the Court of Appeals consolidated Dockets Nos. 75-2070 and 75-2133 for consideration on the merits. After Petitioners filed their opening brief with the Court of Appeals, the Board issued its *Order Granting Exemptions and Instituting Investigation,* Order 76-3-114, on March 16, 1976. In Order

[6]NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty states and of the District of Columbia, Puerto Rico and the Virgin Islands engaged in the regulation of carriers and utilities. NARUC contains those State officials, including the members of the California Commission, charged with the duty of regulating air transportation within their respective States.

76-3-114 the Board renewed the exemptions granted to PSA and Air Cal in Orders 75-6-135 and 75-9-78, and instituted its *Lake Tahoe Service Investigation* at its Docket 29000. While proclaiming its intention to examine a number of the issues raised with respect to air service to Lake Tahoe from an evidentiary standpoint, the Board also clearly stated that ". . . we remain convinced that air service at Lake Tahoe is interstate in character under prevailing law, but we believe that the PUC and other interested persons should have a forum to present *empirical evidence* to the contrary." (Emphasis added.) (Order 76-3-114, Appendix E, p. 49).

Both California and NARUC continued to maintain, however, that despite this new investigation obviously prompted by the Board's recognition of the deficiencies in Order 75-6-135 and Order 75-9-78, it was clear that the Board did not intend to change its legal conclusion, and thus the very basis for the earlier orders and the restrictions on air service which were imposed.

Notwithstanding the Court of Appeal's own conclusion that the Board had, "Without the benefit of a full hearing or investigation . . . unnecessarily chose[n] to announce its attitude about the nature of air service in the Lake Tahoe area," and notwithstanding the admitted lack of any record upon which to base the Board's restrictions, the Court of Appeals for the District of Columbia Circuit nonetheless affirmed these orders in its judgment entered March 14, 1977. The Court of Appeals did so on the basis of its reasoning

that the challenge by California and NARUC was premature and that the ". . . full record now being developed . . ." in the *Lake Tahoe Service Investigation* will "later", provide ". . . ample opportunity to define the legal principles differentiating interstate from intrastate air service in the Tahoe region based on solid factual premises." (Majority Opinion, Appendix B, p. 7).

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

As Circuit Judge Wilkey so aptly stated in his dissent:

> "An agency should not be able to make adverse decisions based on a hypothetical finding of fact, wait until an aggrieved party seeks to challenge the lack of substantial evidence by judicial review, *then* begin to establish facts in support of its hypothetical finding, *and* in the meanwhile maintain, without judicial examination, the initial decisions based on the hypothetical finding." (Dissenting Opinion, Appendix B, p. 21).

The Board's decisions based upon its hypothetical *de minimis* finding have a decidedly adverse effect upon the citizens of California. Furthermore, the ramifications of the Court of Appeal's affirmation in this instance could be extended far beyond the confines of the instant case. If the decision of the Court of Appeals is permitted to stand, it will, contrary to this Court's earlier pronouncements in similar cases, establish a very dangerous and far reaching precedent for all administrative agencies to follow.

1. **AN ADMINISTRATIVE AGENCY'S ORDERS WHICH ARE BASED UPON A FINDING FOR WHICH THERE IS NO RECORD SUPPORT SHOULD NOT BE AFFIRMED.**

In reviewing the opinion of the United States District Court for the Southern District of Illinois upholding an order of the Interstate Commerce Commission, this Court reiterated its long standing rule as set forth in *Securities and Exchange Commission v. Chenery,* 332 U.S. 194, 196, 91 L.Ed. 1995, 1999, 67 S.Ct. 1575, 1577, that:

> "'[A] simple but fundamental rule of administrative law . . . is that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the ground invoked by the Agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . .'" *Burlington Truck Lines v. United States,* 371 U.S. 156, 169, 9 L.Ed.2d 207, 216, 83 S.Ct. 239, 246.

In its opinion, the Court of Appeals characterizes the Board's *de minimis* finding which forms the very basis for the restrictions contained in its orders as prematurely and unnecessarily announced "dicta." Despite its temptation to address this "dicta" the Court of Appeals states that it is "not possible" to do so because " . . . it cannot know, let alone evaluate the factual basis for . . . [the Board's] determinations and the expertise of the Board [presumedly to be exercised in the subsequently instituted *Lake Tahoe Service Investigation*] *will* undoubtedly throw considerable light on the underlying legal principles." (Emphasis added.) (Majority Opinion, Appendix B, pp. 6, 7). While petitioners acknowledge that a full record is *now* being developed, we submit that this record clearly cannot lend validity to the Board's prior orders.

A few pertinent facts bear repeating. As already noted, in February 1975, both PSA and Air Cal obtained authority from the California Commission to provide service between Tahoe Valley Airport, and other points in California. This authority allowed PSA and Air Cal to "tack" their other California intrastate flights to the Tahoe flights. Thus, under the California Commission's orders, PSA was able to serve Tahoe and San Diego via Los Angeles and Burbank, and Air Cal was able to serve Tahoe and San Francisco, Santa Ana, Ontario, Palm Springs and San Diego via San Jose or Oakland. The Board issued Order 75-6-135 on June 24, 1975, in response to applications for exemption filed by PSA and Air Cal. In Order 75-6-135, the Board authorized service by PSA between Tahoe and Los Angeles and Burbank, and by Air Cal between Tahoe and Oakland and San Jose. However, unlike the California Commission, it specifically prohibited PSA and Air Cal from "tacking" any of its intrastate flights to the Tahoe flights. This restriction, along with the other restrictions imposed in Order 75-6-135 prohibiting interline ticketing and baggage handling as well as the publishing of connecting schedules, were stated by the Board to be "necessary" because "air service at Lake Tahoe is interstate in nature by definition" since "more than a *de minimis* number of passengers between Lake Tahoe

and other California points originate or terminate their journeys in Nevada." (Order 75-6-135, Appendix C, pp. 29, 30).

It is clear that at the time the Board imposed these restrictions, it did so on the basis of its factual *de minimis* finding for which the Court of Appeals, and the Board by its subsequent institution of the *Lake Tahoe Service Investigation,* admit there was absolutely no evidentiary basis of record. We cannot improve upon Judge Wilkey's statement that "The Board's restriction, and the factual finding on which it rests, are the guts of the issue here; the restrictions hurt petitioners, and the fact finding rests on nothing but thin air. The Board has not cited—in order, in opinion, in brief, or in argument—one fact, one passenger in interstate travel, to support its finding of interstate air service at Lake Tahoe." (Dissenting Opinion, Appendix B, p. 10).

The Board's subsequently instituted proceeding can not cure this very serious defect in the Board's initial orders. Nor can the mere pendency of the *Lake Tahoe Service Investigation* support the continuation, in the interim, of the restrictions on air service which rest upon this defective finding. Although it seems almost unimaginable that Board restrictions which can only serve to deprive the citizens of California of service previously authorized by the California Commission should be continued so that the Board can *now* attempt to find the adequate support which it failed to gather *before* it issued the orders, that is precisely what the Court of Appeals has sanctioned.

Following this Court's opinion in the *Burlington* case, the Court of Appeals for the First Circuit once stated:

> "On review nothing is clearer than the principle that we examine the Board's reasons and not the subsequent rationalizations of its counsel. *Burlington Truck Lines, Inc. v. United States,* 1962, 371 U.S. 156, 168-169, 83 S. Ct. 239, 9 L. Ed. 2d 207. The agency cannot be affirmed by supplying reasons and facts that it had neither found nor considered to be relevant. We take the case on the Board's own statement." *Trailways of New England, Inc. v. C.A.B.,* 412 F. 2d 926, 931 (C.A. 1, 1969).

However, when the Board's reasons for its orders are examined it becomes abundantly clear that they are without basis in the record, and that it is indeed the Board's and its counsel's subsequent rationalizations that have led to the Court of Appeals' affirmation.

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2. THE PRECEDENT ESTABLISHED BY THE COURT OF APPEALS' ORDER COULD BE EXTENDED FAR BEYOND THE CONFINES OF THE INSTANT CASE.

Because the Court of Appeals failed to comprehend any present harm which flows from the Board's orders, it has affirmed orders which it admits were based upon a finding which was "prematurely" and "unnecessarily" announced. As Judge Wilkey stated in his dissent, "Anyone familiar with principles of judicial review of administrative agency action would have thought that the present total absence of a factual

basis for the Commission's action was a vice calling for the action to be set aside, not a virtue inducing the Court to sustain agency action while the supporting facts are gathered over a period of years." (Dissenting Opinion, Appendix B, pp. 8, 9).

It may well be a period of years before the Board decides the legal issues involved in the *Lake Tahoe Service Investigation.* Order 76-3-114 was issued March 16, 1976. Although hearings have been completed and the record closed, the target date for issuance of an initial decision by the Presiding Administrative Law Judge has now been twice extended to September 23, 1977. Given the time necessary for the Board to review and act upon this initial decision, plus the time for further judicial review which even the Court of Appeals seems to contemplate, it is clear that years could pass before the matter is finally settled. During this time the restrictions imposed by the Board which are without any record support will be continued, threatening the discontinuance of valuable and needed air service to the citizens of California.

Since the Board stated in Order 76-3-114 that it "remains convinced that air service at Lake Tahoe is interstate in character under prevailing law, but . . . believe[s] the PUC and other interested persons should have a forum in which to present *empirical evidence* to the contrary." (Emphasis added.) (Order 76-3-114, Appendix E, p. 49), a significant question is raised as to what purpose, if any, will be served by this delay other than giving the Board an opportunity to gather "empirical" or factual, evidence to

support its earlier orders. Indeed, one must seriously question the likelihood that the Board will ultimately arrive at a different conclusion than that contained in its earlier orders. In the meantime, should the citizens of California suffer in order to give the Board the opportunity to gather the evidence which all agree should have been gathered *prior* to the issuance of its orders? Petitioners clearly do not think so.

Far-reaching questions are raised by the Court's affirmation. For example, should the Interstate Commerce Commission (ICC) be allowed to award route authority without any record support and after another carrier takes issue with its order, go back and *then* gather evidence in a subsequent proceeding to support its order while maintaining, in the interim, its earlier award of route authority? Although the answer to such a question is clearly no, that is precisely what the Court of Appeals has allowed the Board to do in this instance.[7]

Furthermore, because the court below found an insufficient basis upon which to decide the legal questions involved, this does not mean that it should have affirmed the Board's orders in an attempt to avoid deciding the jurisdictional question. Rather, the proper course for the Court to take would have been, as Judge Wilkey has suggested, to remand the case to the Board with instructions to lift the restrictive conditions until such time as some basis is established

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[7]This Court in fact specifically reversed a judgment of the United States District Court for the Southern District of Illinois which upheld such an action by the ICC in ***Burlington Truck Lines*** *v.* ***United States,*** supra.

which may support their imposition. In the Board's present fact finding investigation, it may find support for its prior hypothesis. That does not mean that in the interim its orders should stand.

We do not present this Honorable Court with a proceeding in which the presence of substantial evidence has dictated that the Court of Appeals accept the Board's conclusions which it has drawn from such evidence, nor even with a proceeding wherein conflicting interpretations have been drawn from substantial evidence wherein judicial intervention is not called for. (See 49 U.S.C. Sec. 1486(e); *Western Airlines, Inc. v. Civil Aeronautics Board,* 161 U.S. App. D.C. 319, 495 F.2d 145, 152 (1974); *Braniff Airways, Incorporated v. CAB,* 126 U.S. App. D.C. 399, 379 F.2d 453 (1967).) Rather we present this Court with orders in which the essential finding upon which the Board imposed its restrictions is based upon absolutely no evidence of record. In an effort to defer its decision until some evidence is gathered, the Court of Appeals has, despite this total lack of evidentiary support, sanctioned the continuation of these restrictions which can only serve to hurt the citizens of California in order to allow the Board to go back and now attempt to establish that record support.

The public interest requires that this Honorable Court review this action so that repetition of similar action by the Board, or indeed by any other agency, does not occur.

CONCLUSION

Petitioners present this Court with a question of great importance, not only with respect to the case before it, but with respect to the future actions of all administrative agencies. Neither the Board nor any other agency should be able to issue orders resulting in a detriment to the public, and *then,* if an aggrieved party challenges its order, go back and *later* attempt to establish a record to support its hypothetical finding, while being allowed to maintain its unsupported orders in the interim.

Because of the very important question presented, California respectfully submits that this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Dated, June 9, 1977.

Respectfully submitted,

JANICE E. KERR,
J. CALVIN SIMPSON,
ANDREW J. SKAFF,
Attorneys for Petitioners the People of the State of California and the Public Utilities Commission of the State of California.

(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
for the District of Columbia Circuit

September Term, 1976

The People of the State of California and the Public Utilities Commission of the State of California, Petitioners, vs. Civil Aeronautics Board, Respondent, Air Nevada, Pacific Southwest Airlines, Air California, Intervenors.	No. 75-2070
National Association of Regulatory Utility Commissioners, Petitioner, vs. Civil Aeronautics Board, Air Nevada, Pacific Southwest Airlines, Air California, Texas Aeronautics Commission, Intervenors.	No. 75-2133

Petitions for Review of Orders of the Civil Aeronautics Board

BEST COPY AVAILABLE

Before: ROBB and WILKEY, Circuit Judges, and GESELL,* United States District Judge, United States District Court for the District of Columbia.

JUDGMENT

These causes came on to be heard on petitions for review of orders of the Civil Aeronautics Board and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the orders of the Civil Aeronautics Board under review are hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam,
For the Court,
/s/ George A. Fisher,
George A. Fisher,
Clerk.

Date: March 14, 1977.

Opinion for the Court filed by District Judge Gesell.

Dissenting opinion filed by Circuit Judge Wilkey.

*Sitting by designation pursuant to 28 U.S.C. § 292 (a).

Appendix B

United States Court of Appeals
for the District of Columbia Circuit

No. 75-2070
The People of the State of California and the Public Utilities Commission of the State of California, petitioners
v.
Civil Aeronautics Board, respondent
Air Nevada
Pacific Southwest Airlines
Air California, intervenors

No. 75-2133
National Association of Regulatory Utility Utility Commissioners, petitioner
v.
Civil Aeronautics Board, respondent
Air Nevada
Pacific Southwest Airlines
Air California
Texas Aeronautics Commission, intervenors

On Petition for Review of Orders
of the Civil Aeronautics Board

Andrew J. Skaff, with whom *Richard D. Gravelle* and *J. Calvin Simpson* were on the brief, for petitioners in No. 75-2070.

Sumner J. Katz, with whom *William Paul Rodgers, Jr.* were on the brief for petitioners in No. 75-2133.

Alan R. Demby, Attorney, Civil Aeronautics Board, with whom *James C. Schultz,* General Counsel, *Jerome Nelson,* Deputy General Counsel, and *Glen P. Bendixsen,* Associate General Counsel, Civil Aeronautics Board, were on the brief, for respondent.

J. William Doolittle for intervenor, Air California.

Cecil A. Beasley, Jr. and *John C. Smuck* were on the brief, for intervenor Pacific Southwest Airlines. *Richard D. Mathias* entered an appearance for intervenor Pacific Southwest Airlines.

Rex H. White, Jr., Assistant Attorney General, State of Texas, was on the brief for intervenor, Texas Aeronautics Commission. *John David Hughes,* Assistant Attorney General, State of Texas entered an appearance for intervenor, Texas Aeronautics Commission.

Robert B. Nicholson and *Edward E. Lawson* Attorneys, Department of Justice entered appearances for respondent.

James L. Devall entered an appearance for intervenor, Air Nevada.

Before: ROBB and WILKEY, *Circuit Judges,* and GESELL,* *United States District Judge,* United States District Court for the District of Columbia.

Opinion for the Court filed by *District Judge* GESELL.

*Sitting by designation pursuant to 28 U.S.C. § 292(a).

Dissenting Opinion filed by *Circuit Judge* WILKEY.

GESELL, *District Judge*: The State of California, its Public Utilities Commission, and the National Association of Regulatory Utility Commissioners petition here for review of Civil Aeronautics Board orders[1] which granted two intrastate California airlines conditional exemption from regulation as interstate carriers. The airlines in 1975 sought and obtained exemption from Board regulation[2] despite holding themselves out as providing service to Lake Tahoe, Nevada, a resort located near the California border. Subsequently, in 1976, the Board temporarily renewed these exemptions[3] pending a complete investigation into the air service patterns of the Lake Tahoe area.[4] Petitioners, who participated in the proceedings below, are disturbed by indications in the 1975 rulings that the Board is extending its jurisdiction in a way that impinges upon state regulation of intrastate airlines. Neither airline which sought and obtained the exemptions, however, has challenged the Board orders. They do appear here as intervenors,

[1]Order 75-6-135 (issued June 27, 1975); Order on Reconsideration, Order 75-9-78 (issued September 22, 1975).

[2]Pursuant to 49 U.S.C. § 1386(b)(1).

[3]Order 76-3-114 (issued March 16, 1976).

[4]This investigation will provide data relevant to both limitations which were temporarily imposed. These were prohibitions on (1) engaging in inter-airline ticketing or baggage transfer, and (2) extending air service beyond those points named in the exemption by connecting Tahoe flights with their intrastate systems, i.e., "tacking".

one supporting petitioners, the other supporting the Board.

The California airlines utilize Tahoe Valley Airport, physically located in California, for their Nevada service. When it granted the 1975 exemptions the Board announced that "in our view air service at Lake Tahoe is interstate in nature by definition." It is to this observation that petitioners object, complaining it constitutes a determination which threatens to limit their jurisdiction. The initial question is whether, in light of the Board's 1976 action opening the issues for fuller inquiry, this 1975 dicta creates a case or controversy which this Court can or should attempt to resolve. We hold that it does not and affirm the Board's orders.

Without the benefit of a full hearing or investigation the Board in 1975 unnecessarily chose to announce its attitude about the nature of air service in the Lake Tahoe area. However, a year later the Board apparently had further thoughts since it ordered a full-scale investigation to determine on an evidentiary record which aspects of Lake Tahoe air service will be deemed interstate in nature. The premature announcement of the Board's "view" was unfortunate because it suggests a predisposition that might lead observers to question the bona fide of the now pending inquiry into Lake Tahoe air service. Thus, it is understandable that petitioners who have a real stake in the outcome of the investigation prefer to have the issue resolved immediately. However, this is not possible. We cannot say with assurance what aspects of Tahoe air service,

if any, will eventually be judged by the Board to be interstate in nature. Certainly we cannot know, let alone evaluate, the factual bases for such determinations, and the expertise of the Board will undoubtedly throw considerable light on the underlying legal principles. So while there is some temptation to confront the issue, this action would be unwise as well as premature. A full record is now being developed. There later will be ample opportunity to define the legal principles differentiating interstate from intrastate air service in the Tahoe region based on solid factual premises.

The parties here are also parties to the pending Board investigative proceedings. They will have an opportunity for full participation in the developing decision. The fact that the Board spoke too soon and too loosely does not mandate judicial review at this time. There is an obvious need for a fuller record to settle the underlying jurisdictional dispute between these parties. That is, in fact, precisely what is being constructed and we are unwilling to interfere.

The subject appeal is not timely. The issue is presently too theoretical and abstract. The decisions of the Board granting exemptions are affirmed, but in so doing the Court is neither approving nor disapproving the "view" expressed in the 1975 Board orders.

Affirmed.

WILKEY, *Circuit Judge,* dissenting: I must disagree with the majority's view that this appeal does not present a case or controversy which calls for judicial

resolution. On the contrary, a careful examination of the facts of this appeal shows that the petitioners are presently suffering harm due to erroneous, unsupported action by the Civil Aeronautics Board. As the record demonstrates:

1. the petitioners are presently hurt by various conditions attached to the Board's orders;
2. these conditions are expressly based upon the Board's finding that the intraCalifornia traffic is interstate commerce; and
3. there is *no evidence* in the record to support the Board's finding, and, hence, no rational basis for the imposition of the conditions that are presently hurting petitioners. Accordingly, the orders of the Board should be reversed and remanded for further proceedings in light of its error.

The fact that the Board is now conducting proceedings to gather facts to justify its *earlier* orders should not mean that in the interim the earlier orders should stand. When the Board has available a factual basis for the rational support of its orders then it can act, but not before. I am amazed at the statement of my colleagues: "A full record is now being developed. There later will be ample opportunity to define the legal principles differentiating interstate from intrastate air service in the Tahoe region based on solid factual premises"[1] Anyone familiar with principles of judicial review of administrative agency action would have thought that the present total absence

[1]Maj. Op. at 3-4.

of a factual basis for the Commission's action was a vice calling for the action to be set aside, not a virtue inducing the court to sustain agency action while the supporting facts are gathered over a period of years.

It is necessary at the outset to provide a short chronology of the key events and details of this appeal. In February 1975 the Public Utilities Commission of the State of California (hereinafter "California Commission") granted authority to Pacific Southwest Airlines (PSA) and Air California (Air Cal) to supply service between Tahoe Valley Airport, California and other points in California. In particular, PSA was authorized to serve Tahoe from Los Angeles and Burbank and Air Cal was authorized to serve Tahoe from San Jose and Oakland. In addition, the California Commission allowed the airlines to connect or "tack" other intrastate flights to the Tahoe flights. (See chart attached) Under this permission PSA was able to serve Tahoe and San Diego via Los Angeles or Burbank and Air Cal was able to serve Tahoe and San Francisco, Santa Ana, Ontario, Palm Springs, and San Diego via San Jose or Oakland.[2]

In June 1975 the Board issued Order 75-6-135, in response to the applications of PSA and Air Cal for exemption from regulation as interstate carriers. The Board, as had the California Commission, granted PSA authority to serve Tahoe from Los Angeles and

[2]The applications to the California Commission were prompted by the then recent termination of California service by Holiday Airline Service, which went bankrupt. The Commission granted short-term extensions and has replaced them with temporary certificates that are still effective.

Burbank and Air Cal authority to serve Tahoe from Oakland and San Jose.[3] However, unlike the California Commission, the Board prohibited both PSA and Air Cal from "tacking" any of its intrastate flights onto the Tahoe flights. *The Board stated that this restriction and others also imposed*[4] *were necessary because "air serice at Lake Tahoe is interstate in nature by definition,"* the Board having found that "more than a *de minimis* number of passengers moving by air between Lake Tahoe and other California points originate or terminate their journeys in Nevada."[5]

The Board's restriction, and the factual finding of interstate service on which it rests, are the guts of the issue here; the restrictions hurt petitioners, and the fact finding rests on nothing but thin air. The Board has not cited—in order, in opinion, in brief, or in argument—one fact, one passenger in interstate travel, to support its finding of interstate air service at Lake Tahoe. It is now engaged in that fact finding effort, and may well succeed in supporting its previous pure imagination. Until it does so, the Board's presently effective orders, damaging to petitioners, rest on noth-

[3]The airlines were also given permission to advertise the availability of Nevada destinations for their Tahoe flights. While the Board considered this activity to be interstate commerce, it was concerned that a prohibition, while within its power, would constrict the full development of the Lake Tahoe market and not be in the public interest.

[4]The applicants were also prohibited from interline ticketing or baggage handling on the Tahoe flights and from publishing connecting schedules for the Tahoe flights.

[5]Order 75-6-135; Joint Appendix (J.A.) at 8. (emphasis added).

ing but the Board's imagination as to what the facts are.

The California Commission filed a petition for reconsideration of Board Order 75-6-135. Among other requests, it sought reconsideration of the restrictions by which Air Cal and PSA would be precluded from providing services authorized by the California Commission. (See chart attached). The National Association of Regulatory Utility Commissioners (NARUC) filed a petition in support of the California Commission; other parties also sought reconsideration.

In its order on reconsideration, 75-9-78, the Board reaffirmed its conclusion that the air traffic to Lake Tahoe from other California points was interstate in nature and continued the relevant conditions, *e.g.*, the prohibition on "tacking." The People of California and its Commission as well as NARUC appealed to this court from both orders. While these appeals were before this court, the Board in its Order 76-3-114 of March 1976 renewed the exemptions with the same relevant restrictions and set up an investigatory hearing to develop a factual record, *e.g.*, as to the "intrastate/interstate mix of [the] passengers" at the Lake Tahoe airport.[6] In this order the Board reiterated its conclusion that air service at Tahoe is interstate in character. The petitioners amended their appeals to include this third order.[7]

Where in this scenario is the present harm that creates a case or controversy? As noted, *the certificates*

[6]Order 76-3-114; Attachment to CAB Br. at 4.

[7]*See* Joint Reply Br. of Pet. at 8.

of the California Commission allowed both airlines to "tack" intrastate routes onto the intraCalifornia Tahoe flights, but the Board exemptions specifically prohibited such "tacking." The first demonstrable harm, thus, is that the statutory power of the California Commission has, in effect, been cut back by the Board. Moreover, this clash in authority, adverse to the California Commission, continues to this day. The California Commission has not acquiesced in the Board's orders. It has objected to every one of them and, indeed, refused to allow PSA to amend its state certificate to comply with the Board's restrictions.[8] A state agency has standing to contest the orders of federal agencies that impose limits on its statutory responsibilities. See *Washington Utilities & Transportation Comm'n v. FCC.*[9] NARUC likewise has standing to represent the interest of its aggrieved member, the California Commission. See *Air Line Pilots Ass'n, Int'l v. CAB.*[10]

The majority errs in its characterization of the harm to the petitioners as untimely and abstract. At this very moment, for example, PSA, pursuant to the Board's orders, is not "tacking" any San Diego service to its Tahoe flights, even though the California Com-

[8]PSA discontinued its "tacked" service between Tahoe and San Diego and sought permission from the California Commission to withdraw its published through fare between Tahoe and San Diego. The California Commission denied permission. As this indicates, PSA decided to operate pursuant to the conditions of the Board's exemption. Hence, it advertises Nevada destinations, see note 3, *supra*, but does not "tack." Air Cal, on the other hand, has elected to forego the Board's exemption. Thus, it does not advertise Nevada destinations but does "tack" intrastate flights, pursuant to the state certificate.

[9]513 F.2d 1142 (9th Cir. 1975).

[10]515 F.2d 1010 (D.C. Cir. 1975).

mission had specifically allowed it to do so. If the Board has illegally imposed this restriction on PSA, then the scope of the state Commission's authority has been unjustifiably abridged. Thus, it has standing here to challenge the basis of the Board's orders.

What, then, is the basis for the Board's restrictions, *e.g.*, the "tacking" prohibitions, that, as I have shown, cause current harm to the petitioners? Put another way, what interest does the Board have in putting limits, for example, on the intrastate "tacking" to the Tahoe flights? The majority, however, regards the Board's "view" on the interstate characterization of traffic at Lake Tahoe Airport as only "dicta." How then can the majority explain the basis for the Board's actions?

As noted earlier, the Board explained in its first order that the "restrictions are necessary because, in our view, air service at Lake Tahoe is interstate in nature by definition. That is to say, PSA and Air California are *now* engaged in air transportation without Board authority."[11] With its view that flights from California points to the California airport at Tahoe were in interstate commerce, the Board was concerned that it might grant too "broad" an exemption to these airlines, which, after all, did not possess interstate certificates from the Board. Hence, it decided to confine what it regarded as "interstate" traffic to Tahoe to the minimum necessary for a "viable" Tahoe service. As a result, it prohibited the intrastate "tacking" that it acknowledged the California Com-

[11]J.A. 8. (emphasis original).

mission had allowed. Similarly, it prohibited interline ticketing or baggage handling and the publication of connecting schedules. All of the Board's actions thus rest upon its conclusion that the air service at Tahoe is interstate in nature, a conclusion the Board is busily trying to buttress by finding the facts it should have had in the first place.

As a foundation for its view of interstate traffic, the Board relied upon its (purely imaginary) fact finding that "more than a *de minimus* number of passengers moving by air between Lake Tahoe and other California points originate or terminate their journeys in Nevada."[12] The conclusion that the Tahoe traffic is interstate rests, in turn, upon the Board's reading of the scope of "interstate air commerce" subject to its jurisdiction under the Federal Aviation Act.[13] Its position is that air transportation between two points wholly within the same state may constitute "interstate air commerce" under the Federal Aviation Act if in those operations the carrier transports more than a *de minimis* volume of traffic moving as part of a continuous journey to another state. Petitioners vigorously argue, however, that air traffic by a carrier wholly within a state may become interstate only if the carrier enters into contractual interline or joint fare agreements for the leg of the journey that carries the traffic into another state. In other words, petitioners contend, a carrier who provides air transportation to points wholly within the same state is not in interstate air commerce solely because of the

[12] *Ibid.*

[13] 49 U.S.C. § 1301(21).

independent movement of more than a *de minimis* number of passengers across state lines, separate and apart from the operations of the carrier. At the Lake Tahoe airport, petitioners state, and the Board does not dispute, that the passengers travel to the Nevada side on an independent basis, without benefit of any formal contractual interline or joint fare agreement by the airlines.

On the basis of these facts the petitioners rest their legal position on *United States v. Yellow Cab Co.*,[14] in which the Court dealt with two types of taxicab transportation, one provided by the railroads and paid for along with the rail tickets, the other paid directly by the passenger to the driver. The Court held that the railroad-contracted taxi service only was in interstate commerce and that the relationship of the second "to interstate transit is only casual and incidental."[15] To what extent *Yellow Cab* has been modified, or to what extent it is applicable to the facts of the instant case, we need not decide nor do we imply any opinion on these legal issues on the merits. Mere recitation of part of the legal issues posed does demonstrate, however, that the Board does require a clear and ample factual basis on which to construct any sustainable legal rationale.[16]

[14] 332 U.S. 218 (1947).

[15] 332 U.S. at 231.

[16] This may be particularly true since the statutory mandate of the CAB relates, not to "interstate commerce," but to the narrower "interstate *air* commerce," "interstate *air* transportation," etc. 49 U.S.C. § 1301(10), (20), (21), (22), and (23); § 1371 *et seq.* A contrary implication might be argued, however, from the somewhat baffling phrase, "whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation," 49 U.S.C. § 1301(21).

Nor is it necessary for us to decide the difficult question of the proper construction of "interstate air transportation" under the Aviation Act, with all its far-reaching implications[17] because the Board has erroneously applied its interpretation, even assuming it is correct. In brief, there is no evidentiary support in the record for the key Board finding that more than a *de minimis* number of passengers moving by air between Lake Tahoe and other California points originate or terminate their journeys in Nevada. The Board provides no statistical or other factual evidence to support its finding. Indeed, its decision to conduct its current evidentiary hearing is a virtual admission that it had no such evidence before it when it chose to characterize the Tahoe traffic. As noted earlier, one of the purposes of the hearing is to determine "the intrastate/interstate mix" of the Tahoe passengers.

In its orders, the Board did advance two separate grounds for its findings, but these grounds do not

[17]The Texas Aeronautics Commission has also intervened in this case on behalf of the petitioner's view of "interstate air transportation." The petitioners warn that:

> The Board could conclude that on any intrastate flight, in any state, "more than a *de minimis*" number of passengers have out-of-state destinations, and declare the service to be interstate in nature and therefore subject to its jurisdiction. As a result, presently active state regulatory commissions could be faced with a virtual cessation of control over these innately local matters. Joint Br. at 23.

Congress, of course, has the constitutional authority to extend Board regulation to all air transportation affecting interstate commerce, which would virtually pre-empt state regulation of commercial flight in its entirety. Whether Congress decides to do so is a matter left to its judgment. However, the question under the Aviation Act is the extent to which Congress has empowered the Board to regulate interstate commerce *short* of its full constitutional definition.

provide substantial support. In its first order, the Board stated that it had already made such a finding, *i.e.,* about *de minimis* traffic at Tahoe, "both explicitly and implicitly," in previous cases. Its reliance upon the cited cases,[18] however, is misplaced, if not misleading. For example, in *Zantop Air Transport,*[19] the question arose whether an intrastate charter flight into the California airport at Tahoe was really interstate since some of the passengers "may well be destined" for the Nevada side. The Board said: "The resolution of this question, however, involves complex factual and legal questions and *can only be settled after a full evidentiary record is developed* through the Board's customary hearing procedure."[20] *No evidentiary record was later developed. Zantop,* along with the other cases cited by the Board, does *not* stand for the proposition that the Board has already made a factual finding about Tahoe traffic. After all, as the Board itself stated, the reason why the Board undertook the current hearing was to inquire into the factual basis for its (previously made) interstate characterization.

In the order on reconsideration, the Board argues inferentially that:

> [I]t must be assumed that both PSA and Holiday (*sic*) are fully aware that a sizeable portion of their Lake Tahoe passengers are interstate passengers for there is no other reason why they would have filed applications for exemptions

[18]Order 75-6-135; J.A. at 8, n.10.

[19]39 C.A.B. 800 (1963).

[20]*Ibid.* (emphasis added).

to hold out the availability of Nevada destinations in the first place.[21]

As noted earlier, the airlines applied for and received permission to advertise the availability of Nevada destinations on the Tahoe flights. This does not automatically prove, however, that at the time of the application or at present that more than a *de minimis* number of Tahoe passengers end or originate in Nevada. At the time of application Air Cal and PSA may have sought permission because they desired *in the future* to attract passengers bound for Nevada. At the time of application their Tahoe traffic may or may not have been composed of a significant number of passengers bound for Nevada. The Board has presented no direct evidence to substantiate its characterization and the logic of the application for future permission, as I have suggested, does not compel us to accept the Board's characterization.

Subsequent to the grant of permission by the Board, PSA, which accepted the exemption, presumably has been advertising the availability of Nevada destinations for its Tahoe flights. Thus, the Board could argue[22] that there is fair assurance now of

[21]Order 75-9-78; J.A. at 16.

[22]I examine this argument because of its close relation to the prior contention of the Board, text at *supra* n. 21. In its Brief in this court, the Board has not addressed or defended any of the alleged grounds in the Board opinions of substantial support for the factual finding of interstate transportation in the Tahoe flights. Nor has the Board filed any supplemental brief, even though the reply brief of Air Cal, an intervenor, claims that the lack of defense amounts to a "concession" that there was no factual support for the finding. While my review of the alleged grounds of support in the Board opinions shows that I do not rely upon any "concession," it is painfully obvious that the Board brief totally avoids any defense, or even mention, of its key factual finding.

more than *de minimis* movement to or from Nevada. It is certainly true that under the Administrative Procedure Act,[23] a factual finding may properly be based on inferences drawn from other evidence. But that circumstantial evidence must have a substantial basis in fact. Here, all the Board can point to in the record, is the simple fact of the permission to advertise. If, for instance, the Board told us that a third of PSA's advertising budget for the Tahoe flights went to promote Nevada destinations, there would, at least, be factual grounds for a rational inference that a substantial number of passengers, *e.g.*, 15%, continued on to Nevada from Tahoe airport. But it is not sufficient support for an inference of substantial movement between Tahoe Airport and Nevada to assert, without more, that the applicants were extended permission to advertise.

As a result of the lack of any tangible evidence behind its interstate finding, the Board is left with no rational basis for the restrictive conditions it imposed on the exemptions for PSA and Air Cal. On all accepted standards of judicial review, the proper course for this court is to remand the case to the Board with instructions to lift the restrictive conditions, *e.g.*, the prohibition on intrastate "tacking." It may well be that the current investigation will provide solid evidence of a more than *de minimis* movement, thus allowing for a proper application of the Board's contested interpretation. But as for the interim, an intervenor has suggested, without Board

[23]5 U.S.C. § 706(2)(E). See *Kephart v. Wilson*, 219 F.Supp. 801, 811 (W.D. Tex. 1963), *aff'd*, 350 F.2d 669 (5th Cir. 1965).

contradiction, that it may take the Board another two years or more to complete the investigation and resolve all the questions.[24] Judicial review, if sought, will also take additional time.

Meanwhile petitioners continue to suffer real harm from the erroneous imposition of the restrictive conditions. The Public Utilities Commission of the State of California has not brought this action just because it feels its regulatory dignity affronted by the whimsical unsupported action of the Board, nor is the joinder of "The People of the State of California" as a petitioner an action without substance. In a very practical sense, it is the *people* of California, and other *consumers* of air transport, who are injured by the illegal action of the Board here. Until the federal agency finds both factual and legal reasons otherwise, the citizens of California (and all travelers within that State) have a perfect legal right to buy tickets on intra-California flights advertised and issued in any manner the California regulatory Commission approves. And at the *prices* the California regulatory body approves. We are familiar with the fact that for several years *intra*state air carriers in both California and Texas, regulated only by a state agency, have been able to offer air transport at far lower fares than the Board regulated interstate carriers.

What my colleagues approve of here is a direct blow by the Board, given without the benefit of any fact-finding or formal proceeding whatever (in which the Board is *now* retroactively engaged), at the consumers of air transport in California, who have the legal right to enjoy the convenience and cost of intra-California air transport regulated only by the California Commission, until such time as the Board can establish that such transport is *inter*state and thus subject to Board regulation.

[24] Air Cal Reply Br. at 6.

Considerations of administrative fairness and regularity counsel us to provide relief in this case. An agency should not be able to make adverse decisions based on a hypothetical finding of fact, wait until an aggrieved party seeks to challenge the lack of substantial evidence by judicial review, *then* begin to establish facts in support of its hypothetical finding, *and* in the meanwhile maintain, without judicial examination, the initial decisions based on the hypothetical finding. I dissent.

	PSA	Air Cal
PUC 19 Feb. 1975	1. authorization to serve Tahoe from Los Angeles and Burbank 2. authorization to "tack" Tahoe flights with San Diego	1. authorization to serve Tahoe from San Jose and Oakland 2. authorization to "tack" Tahoe flights with San Francisco, Santa Ana, Ontario, Palm Springs and San Diego
CAB 27 June 1975	1. authorization to serve Tahoe from Los Angeles and Burbank 2. no authorization to "tack" Tahoe flights beyond Los Angeles and Burbank	1. authorization to serve Tahoe from San Jose and Oakland 2. no authorization to "tack" Tahoe flights beyond San Jose and Oakland

Appendix C

Order 75-6-135

United States of America
Civil Aeronautics Board
Washington, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 27th day of June, 1975

Application of Pacific Southwest Airlines for an exemption pursuant to section 416(b)of the Federal Aviation Act of 1958.	Docket 27606
Application of Air California for an exemption pursuant to section 416(b) of the Federal Aviation Act of 1958.	Docket 27623

ORDER

By applications filed on March 11 and March 14, 1975, respectively, Pacific Southwest Airlines (PSA) and Air California seek exemption authority to engage in air transportation between the Tahoe Valley Airport, California,[1] on the one hand, and certain

[1]The Tahoe Valley airport is located on the southern shore of Lake Tahoe in South Lake Tahoe, California. The Tahoe Region may also be served through the Truckee-Tahoe Airport which is located on the northern shore in Truckee, California. The former

other points in California, on the other hand.[2] The two applications differ in that PSA requests the authority for a two-year period without restrictions as to the size of aircraft while Air California agrees to accept the same terms and limitations which apply to the exemption granted to Holiday Airlines by Orders 74-1-134, January 25, 1974, and 74-5-131, May 28, 1974, Docket 26349.[3]

In Order 74-1-134, as modified by Order 74-5-131, the Board: (1) exempted from section 408 of the Act the acquisition of Air Nevada, an air taxi holding a large-aircraft exemption, by Seven Key Industries, Inc.; (2) terminated the *Lake Tahoe Service Investigation,* Docket 22075; and (3) granted Air Nevada and Holiday exemptions to engage in air transportation with Lockheed Electra aircraft between Lake Tahoe and certain other points in California.[4] While the principal benefit accruing from grant of the

airport has a longer runway, superior navigational facilities and is closer to the area's population centers and major tourist attractions.

[2]PSA: San Diego, Burbank and Los Angeles; Air California: Oakland, Ontario, Palm Springs, San Diego, San Francisco, San Jose and Santa Ana.

[3]Pursuant to these orders, Holiday was restricted to the use of Lockheed Electra aircraft, and both Holiday's and Air Nevada's exemptions will terminate on January 24, 1976.

[4]By an erratum to Order 74-1-134, dated February 1, 1974, Air Nevada's authority was modified to permit service via Hawthorne, Nevada, as contemplated by the language of Order 74-1-134 but inadvertently omitted from ordering paragraph 2. In the order on reconsideration, Order 74-5-131, the exemption authority of both carriers was extended to include San Diego; however, Hawthorne was again inadvertently omitted due to a failure to notice the change effected by the erratum to Order 74-1-134. To clarify this matter, an erratum to Order 74-5-131 is being issued concurrently herewith.

exemption to Holiday was the ability of this intrastate carrier to hold out and advertise the availability of destinations in Nevada served through the Lake Tahoe airports, the exemption authority was broad enough to permit interline ticketing and baggage transfer with Board-certificated carriers as well. Air Nevada, on the other hand, was not an intrastate carrier operating pursuant to a certificate issued by the California Public Utilities Commission (P.U.C.) as was Holiday, but rather was an air taxi exempt from federal regulation pursuant to Part 298 of the Board's Economic Regulations. For Air Nevada, the benefit to be derived from the exemption granted by Order 74-1-134 was its ability to operate large (*i.e.*, as defined by Part 298) aircraft in service to Lake Tahoe.

Holiday operated at Lake Tahoe until February 5, 1975, when service was terminated indefinitely and a petition for reorganization was filed in federal bankruptcy court. Air Nevada, however, has not yet instituted the service authorized by Order 74-1-134. Since the certificated authority of Hughes Airwest at Lake Tahoe had, in the interim, been deleted, Order 74-5-75, May 15, 1974, the demise of Holiday left the area with no service.[5] Accordingly, the P.U.C. on February 19 issued 90-day exemptions to PSA and Air California to serve Lake Tahoe with Lockheed Electra

[5]Ram Airways, a commuter carrier, had served Lake Tahoe until November 15, 1974. On that date, its schedules ceased to appear in the Official Airline Guide.

aircraft.[6] It is the issuance of these intrastate exemptions which has precipitated the filing of the applications now before the Board.

In support of their applications, PSA and Air California cite their exemptions from the P.U.C., the abrupt termination of service by Holiday and the limited nature of the relief sought as evidence of unusual circumstances and the undue burden which certification by the Board would impose. They allege that the Board's findings in Orders 74-1-134 and 74-5-131 are dispositive of the public interest issues as well as the question of whether service at Lake Tahoe should be performed pursuant to exemption rather than certification. In sum, they argue that they will be unable to provide "useful and economically viable service" at Lake Tahoe without an exemption from the Board to engage in air transportation.

Answers in support of PSA's application have been filed by the San Diego Chamber of Commerce, the Hollywood Chamber of Commerce, the City of Burbank and the Burbank Chamber of Commerce. The City of South Lake Tahoe and the South Lake Tahoe Chamber of Commerce have jointly filed a consolidated answer[7] in support of both applications together with a motion for leave to file the late document which will be granted, good cause having been

[6]This exemption authority is more limited than that requested from the Board. Air California may serve only Oakland and San Jose while PSA may serve only Los Angeles and Burbank; however, both carriers may tack this nonstop authority to serve their other points on a one-stop basis.

[7]Consolidated answers were authorized by the Chief Administrative Law Judge by notice dated March 21, 1975.

shown. In addition, Air California filed an answer to PSA's application stating that it does not object to grant of the relief requested provided that Air California's application also receives favorable action.

Consolidated answers in opposition were filed by Western Air Lines and by Air Nevada. Western alleges primarily (1) that the factual circumstances underlying the Board's grant of an exemption to Holiday were significantly different from those in the instant cases, and (2) that a substantial amount of Western's San Francisco/Los Angeles-Reno traffic will be subject to diversion. Air Nevada, on the other hand, argues that it is, and should remain, the carrier designated by the Board to serve Lake Tahoe and that it has failed to inaugurate service solely because of the P.U.C.'s procedures and the conflict of jurisdiction between the P.U.C. and the Board. In this regard, it is alleged that the P.U.C. is attempting to substitute its choice of carrier for that of the Board. Because of this situation, as well as the fact that favorable Board action will enable PSA and Air California to integrate Lake Tahoe into their extensive intrastate route systems, Air Nevada requests a hearing if the Board decides not to deny the applications outright.

In their separate replies to the answers of Western and Air Nevada, the two applicants generally dispute the validity of the claims made. In addition, they cite the failure of Air Nevada to seek temporary authority from the P.U.C. or, alternatively, to institute service, either directly or via Hawthorne, Nevada, if

Air Nevada were convinced that the P.U.C. has no jurisdiction. They conclude that Air Nevada is simply not a going concern and should not be protected by the Board in view of the benefits which would flow from exempting PSA and Air California.

Upon consideration of the pleadings and all the relevant facts, we have decided to grant limited exemptions to PSA and Air California which will be coextensive with those held by Holiday and Air Nevada: that is, they will expire on January 24, 1976, at which time we will once again review the Lake Tahoe situation in light of experience and upon consideration of such applications for renewal as may be filed.

Turning first to the exemption issues, to the extent that PSA and Air California rely wholly upon the Board's decision in Orders 74-1-134 and 74-5-131, their reliance is misplaced. As asserted by Western in its answer, the circumstances are entirely different. The Board's determination in those orders cannot be divorced from the peculiar facts and the contemporaneous decision to terminate the *Lake Tahoe Service Investigation* in which both Holiday and Air Nevada were applicants for certificates. Nevertheless, we concur with the applicants here that, because the Tahoe Valley Airport serves an area of Nevada as well as California, the inability of the applicants to hold out, advertise and promote the availability of Nevada destinations artificially constricts full development of the Lake Tahoe markets, thereby diminishing the prospects for an economically successful, high-quality pat-

tern of service. Consequently, we believe, given the clearly unusual circumstances involved here, that an absolute proscription against interstate advertising and promotion unduly burdens the applicants' operations and is not in the public interest.

On the other hand, we will not in this case grant exemption authority to PSA and Air California which is any broader than necessary to assist the maintenance of a basic, viable Lake Tahoe service pattern. These are large carriers with extensive intrastate systems operated exclusively with pure jet equipment. Heretofore they have expressed no interest to the Board in serving Lake Tahoe nor have they submitted themselves to the Board's jurisdiction except in a few isolated instances.[8] If the Board were to grant exemptions as broad as those requested herein, operations which at this time are considered purely intrastate would become interstate and, therefore, subject to the Board's jurisdiction. In other words, absent certain limitations, neither PSA nor Air California could engage in air transportation at Lake Tahoe and still retain its character as an intrastate operator. Accordingly, PSA and Air California will be authorized to hold out the availability of Nevada destinations only on Lake Tahoe flights serving

[8]See, *e.g.*, Order 68-8-76, August 16, 1968 (denial of limited exemption to carry mail); Order 69-10-114, October 24, 1969 (grant of limited exemption to carry mail); Order 71-8-57, August 12, 1971 (denial of exemption to engage in interline ticketing and baggage transfer); Order 72-2-31, February 9, 1972 (denial of exemption to perform interstate plane-load charter flights for Department of Defense); and Orders E-24895, March 24, 1967, and E-25483, August 2, 1967 (grant of exemptions to operate beyond three-mile territorial waters).

the Los Angeles International and Burbank Airports, in the case of the former, and the Oakland and San Jose Airports, in the case of the latter. No interline ticketing or baggage handling will be permitted nor may the applicants publish connecting schedules in the Official Airline Guide or their own timetables beyond the named points or extend single-carrier service beyond the named points by tacking or connecting Tahoe flights with their intrastate systems.[9]

The foregoing restrictions are necessary because, in our view, air service at Lake Tahoe is interstate in nature by definition. That is to say, PSA and Air California are *now* engaged in air transportation without Board authority. We would not be disposed to legitimize this conduct were it not for two unusual circumstances: (1) there has, until now, been confusion regarding the jurisdiction of the P.U.C. and the Board over service at Lake Tahoe; and (2) in view of Air Nevada's inability to inaugurate service—for whatever reasons—there is every likelihood that Lake Tahoe would be left with no service, a situation clearly inconsistent with the public interest. The Board has previously found, both explicitly and implicitly, that more than a *de minimis* number of pas-

[9]The OAG presently lists PSA's schedules only in the Lake Tahoe-Los Angeles market but lists Air California's schedules in the Lake Tahoe-Santa Ana/San Francisco markets as well as the Oakland/San Jose markets. OAG, June 1, 1975. However, in its system timetable effective April 4, 1975, PSA lists connections in the San Diego-Lake Tahoe market while Air California, in its system timetable effective April 1, 1975, lists single-plane and/or connecting service in the Lake Tahoe-Santa Ana/Ontario/Palm Springs/San Diego/San Francisco markets. These schedules should be deleted at the earliest possible date.

sengers moving by air between Lake Tahoe and other California points originate or terminate their journeys in Nevada;[10] consequently, the transportation is interstate, not intrastate, notwithstanding that the aircraft may be navigated entirely within California. See *C.A.B. v. Friedkin Aeronautics,* 246 F.2d 173 (9th Cir. 1957). In the past the Board has not challenged the authority of the P.U.C. to regulate such carriage concurrently since no significant conflicts have arisen. However, any Board decision to grant specific certificate or exemption authority to engage in air transportation at Lake Tahoe constitutes an affirmative exercise of the Board's regulatory jurisdiction pursuant to the policy of the Federal Aviation Act, thereby, in our opinion, precluding the P.U.C. from taking action in contravention of such a determination. See *Frontier Airlines v. Nebraska Department of Aeronautics,* 12 N.W. 2d 476 (Neb. 1963).[11]

Accordingly, It Is Ordered That:

1. Pacific Southwest Airlines be and it hereby is exempted from the requirements and provisions of Title IV of the Federal Aviation Act of 1958, as amended, and the rules, regulations and requirements

[10]Order 74-1-134, January 25, 1974; Application of California Time Airlines, Inc., Order E-22387, June 30, 1965; and Zantop Air Transport, Burbank-Lake Tahoe Exemption, 39 C.A.B. 800 (1963).

[11]Based upon our assessment of both the nature of the air traffic at Lake Tahoe and the effect of our grant of specific exemption authority, we believe the opinion of the P.U.C.'s staff that Air Nevada must have a certificate from the P.U.C. when the carrier has only exemption—as opposed to certificate—authority from the Board to be incorrect as a matter of law. See Consolidated Answer of Air Nevada, Attachment C, page 3.

of the Board thereunder, to the extent that they would otherwise prevent the carrier from engaging in air transportation between Los Angeles and Burbank, California, on the one hand, and South Lake Tahoe, California, on the other hand: *Provided,* that the carrier shall not engage in interline ticketing or baggage transfer with any other air carrier; and *Provided further,* that the carrier shall not publish schedules holding out the availability of single-plane or connecting air transportation between South Lake Tahoe, on the one hand, and any point in California other than Los Angeles or Burbank, on the other hand;

2. Air California be and it hereby is exempted from the requirements and provisions of Title IV of the Federal Aviation Act of 1958, as amended, and the rules, regulations and requirements of the Board thereunder, to the extent that they would otherwise prevent the carrier from engaging in air transportation between Oakland and San Jose, California, on the one hand, and South Lake Tahoe, California, on the other hand: *Provided,* that the carrier shall not engage in interline ticketing or baggage transfer with any other air carrier; and *Provided further,* that the carrier shall not publish schedules holding out the availability of single-plane or connecting air transportation between South Lake Tahoe, on the one hand, and any point in California other than Oakland or San Jose, on the other hand;

3. The authority granted in ordering paragraphs 1 and 2, above, shall expire on January 24, 1976, unless sooner terminated by the Board;

4. Except to the extent granted herein, the applications of Pacific Southwest Airlines in Docket 27606 and Air California in Docket 27623 be and they hereby are denied;

5. The motion of the City of South Lake Tahoe and the South Lake Tahoe Chamber of Commerce for leave to file a late answer in Dockets 27606 and 27623 be and it hereby is granted; and

6. The authority granted herein may be amended or revoked at any time at the discretion of the Board without hearing.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND
Secretary

(Seal)

MINETTI, Member, Concurring:

I concur in the Board's decision to authorize PSA and Air California by exemption, to provide service to South Lake Tahoe. As the Board's opinion indicates, there is a strong likelihood that Lake Tahoe would be left without service, or that the existing operations of PSA and Air California would be seriously hampered, in the absence of the exemptions. Nonetheless, I believe that the material changes in fact which have occurred since January 1974, the objection of Western, and the jurisdictional problems which appear to have impeded the maintenance of reliable air service to Lake Tahoe, must be resolved on a more long-range basis and that an evidentiary proceeding is the appropriate vehicle for that resolution.

Therefore, I would also institute an investigation of service to Lake Tahoe and issue the exemptions on a *pendente lite* basis. Although I do not necessarily disagree with the Board's conclusion that service to Lake Tahoe is interstate, I would nonetheless invite all interested parties (including the California P.U.C.) to participate and to develop on the evidentiary record the legal and factual support so that that the Board (and, if necessary, the courts) can put an end to the legal uncertainty which has adversely affected the traveling public to date. In this connection, the Board should resolve the question of whether, or to what extent, a carrier could continue to operate as an intrastate airline if it is authorized to provide interstate air transportation at Lake Tahoe. The conditions imposed by the Board here, although perhaps necessary to permit PSA and Air California to retain their character as intrastate operators while providing Lake Tahoe service, will clearly inconvenience the traveling public. In my view, the need for such conditions, as well as all other issues, should be promptly resolved in an evidentiary hearing.

/s/ G. JOSEPH MINETTI

Appendix D

Order 75-9-78

United States of America
Civil Aeronautics Board
Washington, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 22nd day of September, 1975

Application of Pacific Southwest Airlines for an exemption pursuant to section 416(b)of the Federal Aviation Act of 1958.	Docket 27606
Application of Air California for an exemption pursuant to section 416(b) of the Federal Aviation Act of 1958.	Docket 27623

ORDER ON RECONSIDERATION

By Order 75-6-135, June 27, 1975, Pacific Southwest Airlines (PSA) and Air California were granted exemption authority, subject to conditions, to engage in air transportation between the Tahoe Valley Airport in South Lake Tahoe, California, and other specified

points in California.[1] The conditions imposed prohibit the two carriers from engaging in interline ticketing or baggage transfer with any other air carriers and from holding out the availability of single-plane or connecting service between South Lake Tahoe and any point other than those which are the subjects of the exemptions.

Petitions for reconsideration of Order 75-6-135 have been filed by Western Air Lines, the State of California and the California Public Utilities Commission (PUC), Air California and the City and Chamber of Commerce of South Lake Tahoe.[2] In addition, Air California petitioned for a stay of the order insofar as it directed the carrier to discontinue publishing through-plane and connecting schedules at the earliest possible date.

Western objects to the Board's failure to prohibit PSA and Air California specifically from holding out the availability of Reno, Nevada, as a destination served through the Tahoe Valley Airport and to the omission of a condition restricting the two carriers to the use of Lockheed Electra aircraft. In support of its position Western argue: (1) that the fares

[1]PSA: South Lake Tahoe-Burbank/Los Angeles; Air California: South Lake Tahoe-Oakland/San Jose. This authority is the same as that granted to the two carriers pursuant to emergency exemptions issued by the California Public Utilities Commission on February 19, 1975. Prior to that time, South Lake Tahoe had been served by Holiday Airlines, another intrastate carrier, but Holiday terminated operations on February 5, 1975.

[2]South Lake Tahoe's pleading is styled as a combined answer and petition for reconsideration. Since the document was filed on the date set for petitions for reconsideration, it will be treated as such.

offered by PSA and Air California in their respective Los Angeles area/San Francisco area-Lake Tahoe markets are sufficiently lower than those offered by Western in its comparable Reno markets to induce passengers to fly to South Lake Tahoe and then to travel by limousine to Reno; and (2) that Holiday Airlines and Air Nevada were restricted to Electra aircraft at Lake Tahoe[3] and the Board gave no reason for departing from that limitation in the instant case. The PUC takes issue with the Board's finding that air transportation to or from Lake Tahoe is interstate in nature, arguing, *inter alia,* that the Board failed to define the *de minimis* standard upon which its finding is based and that the transportation could not be interstate because there are no air carrier contracts contemplating interstate service. Second, the PUC objects on environmental grounds to the absence of an Electra aircraft restriction and suggests that the Board cannot authorize the operation of jets at Lake Tahoe without preparing an environmental impact statement. Air California objects to the prohibition against single-plane and connecting service, arguing that such a restriction serves no useful regulatory purpose and prevents Air California from operating its Lake Tahoe service profitably. The carrier submits that it should at least be permitted to offer single-plane San Francisco/Santa Ana-Lake Tahoe service or, alternatively, that a general restriction to Electra equipment should be imposed in lieu of the beyond-service limitation. Finally, South Lake

[3]See Orders 74-1-134, January 25, 1974, and 74-5-131, May 28, 1974.

Tahoe states that the exemption authority, as conditioned, will leave the area with incomplete and insufficient service and that the Board's finding regarding the interstate nature of Lake Tahoe traffic lacks sufficient factual support.

Answers to these petitions were filed by Air Nevada,[4] PSA, Air California and the National Association of Regulatory Utility Commissioners (NARUC). Air Nevada and PSA generally support the Board's decision, arguing that the petitioners have not demonstrated error and that Air California's request for stay is deficient.[5] Air California supports the petitions of the PUC and South Lake Tahoe and states that it does not object to the specific Reno restriction requested by Western. NARUC argues more broadly, that the Board's action was inconsistent with the scope of its statutory authority, that the interstate air transportation finding is insufficient and that environmental findings must be made in accordance with the National Environmental Policy Act of 1969.

Upon consideration of the pleadings and all the relevant facts, we have decided to modify the authority granted by Order 75-6-135 to limit service to Lock-

[4]Air Nevada, a Part 298 air taxi, holds exemption authority from the Board to operate Electra aircraft between Lake Tahoe and other California points, directly and via Hawthorne, Nevada. See Orders 74-1-134, January 25, 1974, and 74-5-131, May 28, 1974. To date, Air Nevada has not utilized this authority.

[5]Air Nevada does, however, support the Electra limitation proposed by Western and the PUC. PSA opposes on the ground that, having only one Electra at its disposal, the carrier should have flexibility to operate an occasional B-727 in the event of mechanical failure and, if necessary, to operate through Reno with the provision of surface transportation to South Lake Tahoe.

heed Electra aircraft. In all other respects, we find that the petitions have not established error in Order 75-6-135 nor presented any matters that would otherwise warrant grant of any further relief.

The Board omitted a formal limitation on the type of aircraft which could be used by PSA or Air California at South Lake Tahoe because an examination of historic operations at the Tahoe Valley Airport revealed that jet aircraft had never been employed in scheduled service by any carrier. It was the Board's understanding that jets could not be used on a regular basis without severe payload restrictions because of geographical and meteorological conditions at the airport.[6] According to the PUC, however, the Tahoe Valley is a highly sensitive environmental area whose citizens are unalterably opposed to the introduction of jet aircraft. In these circumstances, it is the Board's view that the environmental *status quo* should be maintained by limiting al carriers serving Lake Tahoe pursuant to authority granted by the Board to the use of Electra aircraft.[7]

[6]Although the main runway (18-36) is 8,500 feet long, mountains obstruct landings from, and takeoffs to, the south and the surrounding mountains create severe downdrafts and turbulence during periods of strong wind conditions.

[7]All of our previous grants of exemption authority involving South Lake Tahoe have included the Electra restriction; its inclusion here will work no hardship upon the carriers but will satisfy the well-founded objections of the PUC and the community. To the extent that PSA, which does object to the inclusion of the aircraft restrictions, may occasionally need to serve Lake Tahoe through its own airport or through Reno with jet aircraft, (assuming that an Electra cannot be obtained on short notice), the carrier is free to seek the type of relief accorded to Holiday Airlines in Order 69-5-58, May 14, 1969.

Air California's and South Lake Tahoe's requests for modification or elimination of the restriction against single-plane or connecting service beyond the designated markets are not well-founded. The Board's concern in granting narrow authority was that, "absent certain limitations, neither PSA nor Air California could engage in air transportation at Lake Tahoe and still retain its character as an intrastate operator." Order 75-6-135, at 4. Interestingly, PSA has no difficulty accepting the condition and has already taken steps to comply with its mandate.[8]

The gravamen of Air California's objection is that a large percentage of its Tahoe passengers enplane or deplane at San Francisco and Santa Ana and that, without this support, the Lake Tahoe-Oakland/San Jose service could not be operated profitably. In addition, it is contended by Air California and South Lake Tahoe that the limitation will inconvenience the traveling public. We see no reason to reverse our earlier determination. In the first place, Air California presented no credible evidence that its service would cease absent a broader exemption nor did the carrier demonstrate that the PUC, in its own proceedings, had considered service beyond Oakland and San Jose to be required to support operations on an economic basis.[9] More importantly, Holiday Airlines, whose

[8]See Answer of Pacific Southwest Airlines to Petition of Air California for Reconsideration and Stay (filed July 21, 1975), Appendices A-F.

[9]Presumably, Air California's emergency exemption from the PUC would not have been framed so narrowly if the service authorized could not have been operated economically.

service the PUC and Board authorizations was specifically designed to replace, never held authority from the PUC to serve San Francisco International Airport or Santa Ana. Thus, while Air California, on the one hand, protests that it wants authority no more expansive than that held by Holiday, on the other hand, the carrier seeks significantly broader authority.

Similarly, the alleged inconvenience which passengers may suffer is largely illusory. The only direct service which Lake Tahoe passengers have had to or from San Francisco International Airport was provided by Hughes Airwest—one round trip five days per week for the five-year period preceding that carrier's deletion in May 1974. Even though Holiday never had authority to serve that airport, the community did not oppose Airwest's deletion knowing full well that direct service to San Francisco International could not be provided by the remaining intrastate carrier. In sum, there has not been a sufficient showing that direct or single-carrier connecting service between Lake Tahoe and the San Francisco International and Santa Ana (Orange County) Airports is necessary in light of the Board's serious reservations concerning the scope of the exemptions in issue.

We find that Western's request for a condition specifically precluding the holding out of Reno as a Nevada destination served through Tahoe Valley Airport is not justified. Western alleges that its San Francisco/Los Angeles-Reno traffic will be "freely" diverted. In support of that allegation Western submits nothing more than the fact that the cost of flying

on PSA or Air California to Lake Tahoe, added to the cost of a limousine from Tahoe Valley Airport to Reno, results in an amount less than Western's coach fares in the two Reno markets. There is no analysis of the number of passengers which might be diverted nor is there any attempt to balance the computed lower cost against the added travel time and the relative attractiveness of Western's jet service compared with the other carriers' Electra service. Moreover, to the extent that Western's traffic consists of passengers connecting at San Francisco and Los Angeles, such passengers would not be subject to diversion since they could not purchase through tickets nor have their baggage transferred to PSA or Air California. In short, Western's claim of potential diversion is insubstantial.

Air California, the PUC and NARUC have raised the issue of whether the Board's determination that the air transportation involved is interstate in nature is correct. That conclusion was based upon our analysis of the pleadings in this case, the available records of other proceedings involving air service at Lake Tahoe and relevant court decisions defining both interstate commerce, in general, and interstate air transportation, in particular. We found that a significant number of travelers (*i.e.*, more than a *de minimis* number) who purchase tickets for air transportation between Lake Tahoe and other points in California begin and/or terminate their journeys in Nevada; that each such travelers is moving, partly by air and partly by surface, in a continuous journey in inter-

state commerce between California and Nevada;[10] and that there is likely to be a sufficient number of such individuals on any given PSA or Air California flight such that "the essential nature of the movement and the character of the traffic" on the PSA and Air California flights is interstate, not intrastate.[11]

While the petitioners allege that the Board has failed to offer facts to support its conclusion, their own pleadings are noticeably lacking in facts tending to support their view that the traffic in question is intrastate. Instead, they argue that the Board has incorrectly defined "interstate air transportation" as the term applies to this case. As the cases cited in note 11 indicate, the Board has applied this definition for at least 15 years and would have to alter its fundamental perception of air transportation to accept the narrow definition suggested by the petitioners. Finally, it must be assumed that both PSA and Holiday are fully aware that a sizable portion of their Lake Tahoe passengers are interstate passengers for there is no other reason why they would have filed applications for exemptions to hold out the availability of Nevada destinations in the first place.[12]

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[10]It is our understanding of the law that there need not be a contractual agreement between the passenger and the air carrier by which the carrier agrees to provide all the transportation in question.

[11]Braniff Airways, Exemption for Travel Agents, 40 C.A.B. 887 (1964). See also Application of Aspen Airways, Inc., Order E-18023, February 14, 1962, and Application of Cordova Airlines, Inc., 34 C.A.B. 796 (1961).

[12]Since Air California's request for a stay was contingent upon the Board's issuance of an order on reconsideration, the petition will be dismissed as moot.

Accordingly, It Is Ordered That:

1. Ordering paragraph 1 of Order 75-6-135 be and it hereby is amended to read as follows:

> "1. Pacific Southwest Airline be and it hereby is exempted from the requirements and provisions of Title IV of the Federal Aviation Act of 1958, as amended, and the rules, regulations and requirements of the Board thereunder, to the extent that they would otherwise prevent the carrier from engaging in air transportation with Lockheed Electra aircraft between Los Angeles and Burbank, California, on the one hand, and South Lake Tahoe, California, on the other hand: *Provided,* that the carrier shall not engage in interline ticketing or baggage transfer with any other air carrier; and *Provided further,* that the carrier shall not publish schedules holding out the availability of single-plane or connecting air transportation between South Lake Tahoe, on the one hand, and any point in California other than Los Angeles or Burbank, on the other hand;"

2. Ordering paragraph 2 of Order 75-6-135 be and is hereby is amended to read as follows:

> "2. Air California be and it hereby is exempted from the requirements and provisions of Title IV of the Federal Aviation Act of 1958, as amended, and the rules, regulations and requirements of the Board thereunder, to the extent that they would otherwise prevent the carrier from engaging in air transportation with Lockheed Electra aircraft between Oakland and San Jose, California, on the one hand, and South Lake Tahoe, California, on the other hand: *Provided,* that the carrier shall not engage in interline ticketing or

baggage transfer with any other air carrier; and *Provided further,* that the carrier shall not publish schedules holding out the availability of single-plane or connecting air transportation between South Lake Tahoe, one the one hand, and any point in California other than Oakland or San Jose, on the other hand;"

3. To the extent not herein granted, the petitions of Air California, the People of the State of California and the public Utilities Commission of the State of California, the City of South Lake Tahoe and the South Lake Tahoe Chamber of Commerce, and Western Air Lines, Inc. for reconsideration of Order 75-6-135 be and they hereby are denied; and

4. The petition of Air California for a stay of Order 75-6-135 be and it hereby is dismissed as moot.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND
Secretary

(Seal)

MINETTI, Member, Concurring:

I concur in the Board's action herein. However, I continue to believe that air service at Lake Tahoe should be the subject of a full evidentiary investigation. See my concurrence in Order 75-6-135, June 27, 1975. The further pleadings have only served to strengthen my views in this regard.

/s/ G. JOSEPH MINETTI

Appendix E

Order 76-3-114

United States of America
Civil Aeronautics Board
Washington, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 16th day of March, 1976

Application of Pacific Southwest Airlines for an exemption pursuant to section 416(b) of the Federal Aviation Act.	Docket 27606
Application of Air California for an exemption pursuant to section 416(b) of the Federal Aviation Act.	Docket 27623
Application of Pacific Southwest Airlines for an exemption to use the Reno Municipal Airport as a provisional airport.	Docket 28304
Application of Air Nevada for a certificate of public convenience and necessity.	Docket 28343
Lake Tahoe Service Investigation	Docket 29000

ORDER GRANTING EXEMPTIONS AND INSTITUTING INVESTIGATION

Air Nevada, Pacific Southwest Airlines, Inc. (PSA) and Air California hold exemption authority from the Board to engage in interstate air transportation with Lockheed Electra equipment between South Lake Tahoe, California, and various other points in California.[1] Since receiving their exemptions, PSA has utilized its authority, Air California has served South Lake Tahoe but has allegedly confined its operation to intrastate air transportation, and Air Nevada has failed to inaugurate service. January 24, 1976, was the date for contemporaneous expiration of all three exemptions.[2] On November 25 and December 10, 1975, respectively, PSA and Air California filed applications for renewal of their exemptions[3] while Air Nevada, on September 23, 1975, submitted an application for a certificate of public convenience and necessity encompassing the points which it is now licensed to serve by exemption. In addition, PSA

[1]Air Nevada: Order 74-1-134, January 25, 1974 (and erratum dated February 1, 1974), and Order 74-5-131, May 28, 1974 and (and erratum dated June 27, 1975); PSA and Air California: Order 75-6-135, June 27, 1975, and Order 75-9-78, September 22, 1975. PSA also holds exemption authority to use the Reno Municipal Airport as a provisional airport when use of the Tahoe Valley Airport is precluded by weather or other safety consideration. Order 75-11-10, November 4, 1975.

[2]PSA and Air Nevada have specifically invoked section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), in accordance with Part 377 of the Board's Special Regulations, 14 C.F.R. Part 377. Air California has not done so in the belief that such action was not necessary since the exemption authority was not being used, *i.e.*, there was no "activity of a continuing nature" under the terms of 5 U.S.C. 558(c).

[3]PSA requests renewal for six months; Air California has not suggested any definite date for termination.

has requested renewal and modification of its authority to use the Reno Municipal Airport as a provisional airport when use of the Tahoe Valley Airport is precluded by adverse weather or other unsafe conditions.[4]

In support of their applications, PSA and Air California generally rely upon their prior presentation and the continuing validity of the Board's findings in Orders 75-6-135 and 75-9-78. Each carrier states that it now has received a temporary certificate from the California Public Utilities Commission (PUC) to serve South Lake Tahoe in lieu of its former temporary exemption authority and that each has an application pending before the PUC for permanent certification. As further evidence of the need for renewal of their authority from the Board, PSA claims that it carried 46,000 Tahoe passengers between June and October 1975, and Air California claims to have carried nearly 80,000 Tahoe passengers between March and November 1975. The only substantive difference between the two applications is that PSA is content with the scope of its authority (*i.e.*, Los Angeles/Burbank-South Lake Tahoe) while Air California reiterates its desire to expand its authority to include San Francisco and Santa Ana (Orange County) with Oakland and San Jose. Air California alleges that it has not used its exemption because to do so the carrier would have to discontinue its intrastate, single-plane Santa Ana/San Francisco-Tahoe

[4]See Order 75-11-10, November 4, 1975. PSA desires authority to substitute jet equipment on flights serving the provisional airport when its Electra aircraft is unavailable for mechanical reasons.

schedules to conform with the conditions imposed by the Board in Orders 75-6-135 and 75-9-78. In other words, Air California desires to use its exemption but can justify doing so economically only if the authority is expanded to include the two aforementioned points.

Answers to PSA's application have been filed by the State of California and the PUC, Western Air Lines[5] and Air Nevada.[6] Neither Western nor Air Nevada objects to renewal for six months provided that all the conditions imposed in the previous orders are retained. The PUC maintains its position that the Board was incorrect in concluding that air service at Lake Tahoe is interstate in nature[7] and states that, if PSA's exemption is renewed, none of the existing restrictions should be retained.

Grant of Air California's application, on the other hand, is opposed by PSA and Air Nevada, both of which argue that Air California has failed to observe the Board's prior findings and should not, therefore, receive the benefits of renewed authority. Western and the PUC take the same positions adopted in their respective answers to PSA's application. Air California filed a reply generally disputing the validity of the answers of PSA, Air Nevada, and Western.

Upon consideration of the pleadings and all the relevant facts, we have decided to set for hearing

[5]Western filed a consolidated answer to PSA's applications in Dockets 27606 and 28304.

[6]Air Nevada filed a consolidated answer to PSA's and Air California's applications in Dockets 27606 and 27623.

[7]See Order 75-6-135, at 4-5, and Order 75-9-78, at 5-6.

Air Nevada's application for a certificate and to renew, without modification, the outstanding exemptions pending the outcome of the certification proceeding.

Two years ago when the Board issued exemptions to Air Nevada and Holiday Airlines and terminated the inactive *Lake Tahoe Service Investigation,* Docket 22075,[8] it had been the Board's belief that the Tahoe area would receive reliable air service commensurate with its needs. Upon the termination of operations by Holiday, PSA and Air California were granted limited authority under the same supposition. Nevertheless, the latter authority was purposely conditioned to expire contemporaneously with that held by Air Nevada in order to afford the Board an opportunity to reexamine the effect of our decisions and the prospects for long-term resolution of the problems of air service at Lake Tahoe, problems which are unique because of geographical coincidence and arguably overlapping jurisdiction of this Board and a state regulatory agency.

The Board's decision has resulted in the surfacing of a fundamental conflict of jurisdiction which has, in turn, fostered confusion and uncertainty among the airlines involved and the traveling public. We remain convinced that air service at Lake Tahoe is interstate in character under prevailing law, but we believe that the PUC and other interested persons should have a forum in which to present empirical evidence to the contrary. Furthermore, the level of

[8]Orders 74-1-134, January 25, 1974, and 74-5-131, May 28, 1974.

traffic reported by PSA and Air California calls into question our finding of two years ago that Lake Tahoe did not seem suited to certificated operations. According to information contained in the carrier's applications, Lake Tahoe has generated an average of more than *700 origin/destination passengers per day.* An evidentiary record will enable the Board to determine with reasonable precision the intrastate/interstate mix of these passengers, their true origin and destination, and how much traffic, if any, has been diverted from other airports and other modes of transportation.

We have decided to place in issue the alternative of exemption rather than certification in order to keep all of the Board's options open. Moreover, because Lake Tahoe is alleged to be an environmentally sensitive area, we will require all applicants, whether applying for exeption authority or certificate authority, to file the environmental evaluation required by Part 312 of the Board's Regulations, and we invite other interested persons to submit whatever relevant environmental data and studies are available. Should the Board determine that certification is warranted but that environmental considerations preclude the use of jet aircraft, we tentatively believe that section 401(e)(4) of the Federal Aviation Act would not present an impediment to issuing a certificate prohibiting service with jet equipment. However, this question should also be explored at the hearing. Finally, we recognize that many other important questions of policy and law may have to be addressed if PSA and Air California apply for certificates or for

the type of broad exemption authority in issue. The foremost of these is whether an intrastate airline can retain its character regarding some of its operations while holding a certificate or broad exemption authority from the CAB to serve Lake Tahoe. The parties and the administrative law judge should be prepared to address these types of questions.

In conjunction with instituting a proceeding, we have decided to renew the outstanding exemptions. It has been the Board's practice not to disturb the *status quo* when existing temporary authority becomes the subject of a formal evidentiary proceeding.[9] However, we are not persuaded that modification of Air California's exemption to include Santa Ana and San Francisco or PSA's exemption to use jet equipment on flights serving its provisional airport is in the public interest. Air California's arguments were discussed exhaustively in Order 75-9-78 and no new facts have been presented which would warrant further consideration here. Similarly, we are not convinced that there is merit to PSA's requested modification. PSA desires authority to substitute—apparently at the last minute—jet aircraft for Electra aircraft when a flight scheduled to serve South Lake Tahoe will have to proceed to Reno *and* when the Electra is unavailable for mechanical reasons. In the first place, the confluence of these two circumstances appears extremely remote; in the second place, if a jet is substituted and, subsequently, clearance is re-

[9]See, *e.g.*, Southern Airways, Inc., Exemption, Order 75-6-96, June 20, 1975.

ceived to proceed to South Lake Tahoe, unintended environmental consequences might occur. Therefore, we cannot conclude that modification of the authority granted by Order 75-11-10 is in the public interest.

For the reasons stated in Orders 75-6-135, 75-9-78, 74-5-131 and 75-1-134, as amplified herein, we find that, subject to the conditions contained in the cited orders, enforcement of Title IV of the Act insofar as it would otherwise preclude Air Nevada, PSA and Air California from engaging in interstate air transportation with Electra aircraft at Lake Tahoe would be an undue burden on these carriers by reason of the limited extent of, and unusual circumstances affecting, their operations and would not be in the public interest.

Accordingly, It Is Ordered That:

1. A proceeding designated as the *Lake Tahoe Service Investigation,* Docket 29000, be and it hereby is instituted and set down for hearing before an administrative law judge of the Board at a time and place to be designated hereafter:

2. The proceeding instituted by paragraph 1 above shall include, but not be limited to, the following issues:

a. Do the public convenience and necessity require the certification of an air carrier or air carriers to engage in air transportation between the Tahoe Valley and Truckee-Tahoe Airports, on the one hand, and one or more other points in the State of California, on the other hand;

b. If the answer to (a) is in the affirmative, which carrier(s) should be authorized to engage in such service;

c. If the answer to (a) is in the negative, is it in the public interest to issue exemption authority to an air carrier or air carriers, pursuant to section 416 of the Federal Aviation Act, to engage in air transportation between the Tahoe Valley and Truckee-Tahoe Airports, on the one hand, and one or more other points in California, on the other hand;

d. If the answer to (c) is in the affirmative, which carrier(s) should be authorized to engage in such service;

e. What terms, conditions and limitations, if any, should be placed on the operations of such carrier(s);

3. Any authority granted in this proceeding shall be ineligible for subsidy;

4. The application of Air Nevada in Docket 28343 be and it hereby is consolidated with the proceeding instituted by paragraph 1 above;

5. The effectiveness of the authority granted to Air Nevada by Order 74-1-134 (and erratum dated February 1, 1974), as amended by Order 74-5-131 (and erratum dated June 27, 1975), be and it hereby is extended to January 24, 1978 or until 60 days after final decision in the proceeding instituted by paragraph 1 above, whichever occurs first, unless sooner terminated by the Board;

6. The effectiveness of the authority granted to Pacific Southwest Airlines by Order 75-11-10 and to

Pacific Southwest Airlines and Air California by Order 75-6-135, as amended by Order 75-9-78, be and it hereby is extended to January 24, 1978, or until 60 days after final decision in the proceeding instituted by paragraph 1 above, whichever occurs first, unless sooner terminated by the Board;

7. To the extent not herein granted, the application of Pacific Southwest Airlines in Docket 28304 (filed on November 25, 1975, as amended on December 16, 1975) and Air California in Docket 27623 (filed on December 10, 1975) be and they hereby are denied;

8. Applications, motions to consolidate and petitions for reconsideration of this order shall be filed thirty (30) days from the date of service of this order and answers thereto shall be filed ten (10) days thereafter; and

9. Air Nevada and all other carriers filing applications in the proceeding instituted hereby shall file environmental evaluations pursuant to section 312.12 of the Board's Procedural Regulations, 14 C.F.R. section 312.12 (1975), within 40 days of the date of adoption of this order.[10]

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Acting Secretary

(Seal)

[10]To the extent that the procedure established herein does not comply with Part 312 of the Procedural Regulations, the Board hereby waives the requirement of Part 312 that applications contain an environmental evaluation for those carriers requesting consolidation with this proceeding.

Appendix F

Section 101 of the Federal Aviation Act of 1958, as amended, 72 Stat. 737 (1958), as amended by 75 Stat. 467 (1961), 76 Stat. 143 (1962), 82 Stat. 867 (1968), 84 Stat. 921 (1970), and 88 Stat. 409, 419 (1974), 49 U.S.C. 1301, provides in pertinent part:

"Section 101. Definitions.

As used in this chapter, unless the context otherwise requires

. . . .

(21) 'Interstate air transportation', 'overseas air transportation', and 'foreign air transportation', respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between respectively—

"(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

"(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

"(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(22) 'Intrastate air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage solely in intrastate air transportation.

(23) 'Intrastate air transportation' means the carriage of persons or property as a common carrier for compensation or hire, by turbojet-powered aircraft capable of carrying thirty or more persons, wholly within the same State of the United States."

Section 1006 of the Federal Aviation Act of 1958, as amended, 72 Stat. 795 (1958), as amended by 74 Stat. 255 (1960), and 75 Stat. 497 (1961), 49 U.S.C. 1486, provides:

Sec. 1006 Judicial Review of Orders

(a) Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Venue

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

Notice to Board or Administrator; filing of record

(c) A copy of the petition shall, upon fiing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of Title 28.

Power of court

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

Conclusiveness of findings of fact; objections

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless

there were reasonable grounds for failure to do so.

Review by Supreme Court

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of Title 28.

No. 76-1771

Supreme Court, U. S.
FILED
AUG 18 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PETITIONERS

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-21) is not yet reported. The orders of the Civil Aeronautics Board (Pet. App. 22-54) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1977 (Pet. App. 1-2). The petition for a writ of certiorari was filed on June 11, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

QUESTION PRESENTED

Whether the court of appeals properly declined to consider petitioner's challenge to a preliminary statement by the Civil Aeronautics Board—that "air service at Lake Tahoe is interstate in nature"—when petitioners have suffered no injury from that statement and the Board is currently re-examining the question on a full adjudicatory record.

STATUTE INVOLVED

The relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. 1301 *et seq.*, are set forth at Pet. App. 55-58 and at note 1, *infra*.

STATEMENT

1. Pacific Southwest Airlines ("PSA") and Air California ("Air Cal") are intrastate carriers certificated by petitioner California Public Utilities Commission ("PUC") to provide intrastate air service to Lake Tahoe, California, from several California cities (Pet. App. 9). In March 1975, PSA and Air Cal filed with the Civil Aeronautics Board (the "Board") applications for exemption from federal regulation pursuant to Section 416(b)(1) of the Federal Aviation Act (49 U.S.C. 1386(b)(1)), which authorizes the Board to exempt an air carrier from the economic regulatory provisions of the Act, including the requirement that it obtain a certificate of convenience and necessity before engaging in interstate air transportation.[1] The applications

[1]Section 416(b)(1) provides that "[t]he Board * * * may * * * exempt from the requirements of this title * * *, any air carrier or class of air carriers, if it finds that the enforcement of this title * * * is or would be an undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest."

sought exemptions to hold out, promote, and serve bordering Nevada destinations on flights to Lake Tahoe (see Pet. App. 22-23).[2]

The Board, on June 27, 1975, exempted PSA and Air Cal for six months from the requirements and provisions of the Act "to the extent that they would otherwise prevent the carrier[s] from engaging in [interstate] air transportation" to Lake Tahoe (Pet. App. 31). The exemptions permitted PSA and Air Cal to serve Nevada destinations on Lake Tahoe flights from Los Angeles and Burbank, in the case of the former, and Oakland and San Jose, in the case of the latter (*ibid.*).

The Board, however, limited the exemptions by prohibiting PSA and Air Cal from connecting or "tacking" other intrastate flights to the Lake Tahoe flights.[3] The limitation was intended to isolate the carriers' interstate Lake Tahoe operations from their extensive intrastate route systems to insure that they would retain their intrastate character (Pet. App. 28). The Board expressed the "view" that "air service at Lake Tahoe is interstate in nature by definition," the Board having found in previous proceedings that "more than a *de minimis* number

[2]Lake Tahoe is a popular resort area that straddles the California-Nevada border. Many of the hotels and major tourist attractions, including gambling casinos and ski resorts, are situated on the Nevada side of the border, but the airport serving the area, the Tahoe Valley Airport, is located on the California side (Pet. App. 22, n. 1). PSA requested exemption authority to serve Nevada destinations from San Diego, Burbank and Los Angeles (Pet. App. 23, n. 2). The exemption application filed by Air Cal covered service from Oakland, Ontario, Palm Springs, San Diego, San Francisco, San Jose and Santa Ana (*ibid.*).

[3]Thus, for example, PSA cannot utilize its Lake Tahoe exemption to carry passengers from San Diego via Los Angeles to Lake Tahoe.

of passengers moving by air between Lake Tahoe and other California points originate or terminate their journeys in Nevada" (Pet. App. 29-30).

2. In response to applications from PSA and Air Cal for renewal of their exemption authority, the Board decided in March 1976, (1) to institute a proceeding designated as the *Lake Tahoe Service Investigation* (the "*Investigation*") to consider future service in the Lake Tahoe market, and (2) to extend, without modification, the outstanding exemptions pending the outcome of the *Investigation* (Pet. App. 45),[4] While noting that it "remain[ed] convinced that air service at Lake Tahoe is interstate in character under prevailing law," the Board noted that the *Investigation* would provide a forum for petitioner PUC and other interested persons "to present empirical evidence to the contrary" (Pet. App. 49). It ordered that an evidentiary record be developed to "determine with reasonable precision the intrastate/interstate mix of these passengers" (Pet. App. 50).

The *Investigation* is now in its final stages. PSA and Air Cal each has filed applications in the alternative for a certificate of convenience and necessity or an exemption without the prohibition on "tacking," which applications are being considered in the *Investigation*. The evidentiary hearings have been completed and the target date for issuance of the administrative law judge's decision is September 23, 1977.

3. Petitioner PUC filed a petition in the court of appeals seeking review of the Board's "view" that "air service at Lake Tahoe is interstate in nature by definition." The

[4]The exemptions were extended to January 24, 1978, or until 60 days after final decision in the *Investigation*, whichever occurs first (Pet. App. 53).

court, with one judge dissenting, affirmed the Board's grant of exemptions (Pet. App. 3-7). It concluded that the challenge by PUC was "premature" in view of the now pending *Investigation* and did not present an appropriate matter for judicial review (Pet. App. 6-7).

ARGUMENT

The court of appeals correctly declined to reach the merits of this controversy on the present record, and that decision does not warrant review by this Court.

1. Although the question whether carrier service from California cities to Lake Tahoe constitutes interstate travel may ultimately prove a fit subject for judicial review, the opinion expressed by the Board in the orders now appealed is at most preliminary and tentative. Indeed, the Board itself has indicated that its view is not settled by instituting an investigation into that very question, at which petitioners have a full opportunity "to present empirical evidence to the contrary" (Pet. App. 49). Under the circumstances, the court of appeals properly concluded that "[t]here later will be ample opportunity to define the legal principles differentiating interstate from intrastate air service in the Tahoe region based on solid factual premises" (Pet. App. 7).

To justify immediate judicial review of this matter, petitioners suggest that the Board's orders "can only serve to deprive the citizens of California of service previously authorized by the California Commission" (Pet. 12). But PSA and Air Cal are now operating precisely as they were before the Board's orders: within the jurisdiction of the PUC. The carriers have chosen not to limit their operations in the manner set forth in their exemptions but instead to conduct operations to the full extent permitted by their state

certificates.[5] Thus, at the present time, both PSA and Air Cal are "tacking" or connecting other intrastate flights onto their Lake Tahoe flights, as permitted by their state certificates, although the Board declined to allow "tacking" or connecting in granting exemption authority to the carriers (Air Cal Brief in Support of Certiorari, p. 3; letter from PSA to CAB, in CAB Docket 27606, dated December 20, 1976, App., *infra*).[6]

In view of the pending investigation, there is no reasonable likelihood that the Board will initiate enforcement proceedings against the carriers at this time. The Board's announced view regarding the inherently-interstate nature of Lake Tahoe service at most raises the possibility that, should that view be reaffirmed after the *Investigation*, the regulatory authority of the Board and that of the PUC will come into conflict. Should the Board change its opinion, however, petitioners may suffer no adverse consequences at all. Thus, judicial review may reasonably be postponed until such time as "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties" (*Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149).

2. On the merits, petitioners contend (Pet. 9-17) that there was insufficient evidentiary support for the Board's "view" of the interstate nature of Lake Tahoe service. However, as noted above (p. 5, *supra*), petitioner PUC is a party to the Board's pending investigation of that service

[5]Air Cal never used its exemption authority at any time (Air Cal Brief in Support of Certiorari, p. 3). PSA expanded its operations to included activities not permitted by its exemption in January 1977 (letter from PSA to CAB, in CAB Docket 27606, dated December 20, 1976, App., *infra*).

[6]Neither PSA nor Air Cal sought reveiw below of the limitations placed on their exemption requests (Pet. App. 5). PSA intervened in support of the Board's orders while Air Cal intervened in support of petitioners.

and has an opportunity for full participation in the evidentiary inquiry. As the court of appeals pointed out, "[t]here is an obvious need for a fuller record to settle the underlying jurisdictional dispute between these parties" (Pet. App. 7). The *Investigation*, which is now nearing completion, is expressly intended to satisfy that need. In these circumstances, judicial review of the jurisdictional question "not only deprives the [Board] of the opportunity to make the initial resolution of the issues but also prevents it from doing so in a more suitable context." *American Commercial Lines* v. *Louisville & Nashville R. Co.*, 392 U.S. 571, 592.[7]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN H. SHENEFIELD,
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JAMES C. SCHULTZ,
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Civil Aeronautics Board.

AUGUST 1977.

[7]Likewise, the Board in the *Investigation* is presently considering Air Cal's and PSA's applications for renewed exemption authority free from any prohibition on "tacking."

APPENDIX

PSA
PACIFIC SOUTHWEST AIRLINES

December 20, 1976

Mrs. Ruth B. Erlichman
Chief, Docket Section
Civil Aeronautics Board
Washington, D.C. 20428

Re: Application of Pacific Southwest Airlines
Docket No. 27606

Dear Mrs. Erlichman:

This letter is submitted for the purpose of advising the Board and interested persons of the position of Pacific Southwest Airlines (PSA) with respect to certain services which it plans soon to begin holding out and operating between San Diego and South Lake Tahoe. No action by the Board is requested.*

PSA plans to operate and hold out to the public single-carrier service in intrastate air transportation beginning in January 1977 between San Diego and South Lake Tahoe. PSA holds temporary authority from the California Public Utilities Commission to provide such service by tacking flights between South Lake Tahoe and Los Angeles or Burbank. However, PSA discontinued holding out such service following the CAB's assertion of jurisdiction over operations to and from South Lake Tahoe and its grant to PSA of exemption authority restricted to prohibit publication of schedules holding out the availability of single-

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*PSA assumes this letter will be placed in the correspondence file of the above-referenced docket. Copies have been sent to all persons who have participated in that docket and the related *Lake Tahoe Service Investigation*, Docket 29000.

carrier service in air transportation between South Lake Tahoe and any point in California other than Los Angeles or Burbank. (Order: 75-6-135, June 27, 1975).

In that decision the Board also granted Air California exemption authority between South Lake Tahoe and Oakland and San Jose similarly restricted to prohibit the holding out of schedules between South Lake Tahoe and all other points in California. Nevertheless, Air California continues to publish schedules, advertise, and otherwise hold out services between South Lake Tahoe and San Diego. Such service has been provided by single-plane and on-line connecting flights via Oakland and San Jose.

Air California operates such service despite the above-described restriction on the legal theory that it is not "using" its CAB authority but instead is operating under its temporary authority from the California Public Utilities Commission, which permits San Diego-Oakland/San Jose-Lake Tahoe service by tacking. Air California apparently maintains that its service is not interstate so long as it does not involve intercarrier arrangements, solicitation of interstate traffic, or other circumstances beyond the fact of carriage of a more than a *de minimis* number of interstate passengers. Although the Board's decisions on Lake Tahoe services and its arguments in the pending court case on judicial review reject Air California's position, the Board has apparently acquiesced in Air California's continued holding out service between Lake Tahoe on the one hand, and points in California other than Oakland and San Jose, particularly San Diego, on the other hand.

Although PSA pointed out this situation back on April 16, 1976 in its petition for reconsideration of the Board's renewal of Air California's exemption authority in Order 76-3-144, the Board still has not ruled on that petition.

Further, to our knowledge, the Board has not notified Air California that it is acting illegally.

This situation obviously has put PSA at an extreme disadvantage competitively and has causesd substantial loss of revenues. In these circumstances, PSA must match Air California's competition. At least until the legal situation is clarified and determined in the pending court case, the current Lake Tahoe Service Investigation, or other proceedings, PSA believes that this course is lawful, justified, necessary, and in the public service.

Very truly yours,

P S A - PACIFIC SOUTHWEST AIRLINES

/s/ W. R. Shimp

W. R. Shimp
President and
Chief Executive Officer

Supreme Court, U. S.
FILED
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM OF RESPONDENT NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF CERTIORARI

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MEMORANDUM OF RESPONDENT NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN SUPPORT OF CERTIORARI

Pursuant to Rule 21(4) of this Court's Rules, respondent National Association of Regulatory Utility Commissioners (NARUC) submits its memorandum supporting the petition of the People of the State of California and the California Public Utilities Commission (California PUC) for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 14, 1977.

STATEMENT OF THE CASE

This case involves the questionable assertion of jurisdiction by the Civil Aeronautics Board (Board) over the flights of two intrastate air carriers, Air California (AirCal) and Pacific Southwest Airlines (PSA),[1] and the granting by the Board of restricted exemptions allowing these carriers to serve Lake Tahoe, California (Tahoe), located near the California-Nevada state line. Both AirCal and PSA hold authority from the California PUC to provide air service between Tahoe and other California points, either in single line service or through "tacking" their non-stop Tahoe authority to serve other points on their system on a one-stop basis.

Apparently in deference to the Board's view that neither carrier could hold out to provide service to Nevada points without Board authority, regardless of whether the individual flights crossed state lines, PSA and AirCal, on March 11 and March 14, 1975, respectively, applied for exemption from the Board's economic regulation. By Order 75-6-135, adopted June 27, 1975, the Board granted restricted exemptions, stating:

> [B]ecause the Tahoe Valley Airport serves an area of Nevada as well as California, the inability of the applicants to hold out, advertise and promote the availability of Nevada destinations artificially constricts full development of the Lake Tahoe markets, thereby diminishing the prospects for an economically successful, high quality pattern of service.[2]

While not examining at length the precise grounds for taking jurisdiction over the subject matter of the ap-

[1]PSA and AirCal will sometimes be referred to collectively as the "carriers."

[2]Order 75-6-135, reprinted as appendix C to the Petition for Writ of Certiorari, pages 22-33 at 27-28.

plications, the Board made reference to the carriers' submitting themselves to its jurisdiction and noted that "if the Board were to grant exemptions as broad as those requested herein, operations which at this time are considered purely intrastate would become interstate and, therefore, subject to the Board's jurisdiction."[3]

The Board thereupon granted the exemptions only to the extent of allowing PSA to hold out the availability of Nevada destinations on Tahoe flights serving Los Angeles International and Burbank Airports and allowing AirCal to serve the Oakland and San Jose Airports. In addition, the Board restricted these operations against interline ticketing or baggage handling and prohibited the carriers from publishing connecting schedules or extending single carrier service beyond the above named points by "tacking or connecting Tahoe *flights* [emphasis added] with their intrastate systems."[4]

The Board continued by stating that such restrictions were necessary because "air service at Lake Tahoe is interstate in nature by definition. That is to say, PSA and AirCal are *now* engaged in air transportation without Board authority,"[5] and "any Board decision to grant specific certificate or exemption authority to engage in air transportation at Lake Tahoe constitutes an affirmative exercise of the Board's regulatory jurisdiction . . . precluding the P.U.C. from taking any action in contravention of such a determination."[6]

Subsequent proceedings at the Board level, in which the NARUC participated, resulted in Order 75-9-78, adopted September 22, 1975, which modified the prior order with respect to the type of aircraft which could be used under the

[3]*Id.* at 28.

[4]*Id.* at 28-9.

[5]*Id.* at 29.

[6]*Id.* at 30.

exemption but upheld the prior order in all other respects. In Order 75-9-78, it was recognized that the NARUC, the California PUC and AirCal objected to the Board's understanding of what constituted "interstate air transportation," but the Board upheld this determination on the ground that it had applied this definition for some years.[7] In addition, the Board reaffirmed its self-derived test of "the essential nature of the traffic" as an apparent basis for jurisdiction and for the placing of restrictions on the exemptions granted.[8]

On November 6, 1975, and November 21, 1975, respectively, California PUC and the NARUC petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the foregoing orders of the Board.[9] The cases were consolidated by the Court and an initial joint brief was filed on February 25, 1976, by both petitioners who argued, *inter alia*, that the Board had no jurisdiction to regulate the service in question and that the Board had no factual basis for its determination as to the nature of this service.

During the pendency of the court proceeding, by Order 76-3-114, adopted March 16, 1976, the Board extended the exemptions and initiated a proceeding in *Lake Tahoe Service Investigation*, Docket 29000, in order to ascertain the intrastate/interstate mix of the passengers at Lake Tahoe. In instituting the investigation proceeding, the Board stated:

> The Board's decision has resulted in the surfacing of a fundamental conflict of jurisdiction which has, in turn, fostered confusion and uncertainty among the airlines involved and the traveling public. We remain convinced that air

[7]Order 75-9-78, reprinted as appendix D to the Petition for Certiorari, pages 34-44, at 42.

[8]*Id.*

[9]AirCal and PSA subsequently intervened as parties.

> service at Lake Tahoe is interstate in character under prevailing law, but we believe that the PUC and other interested persons should have a forum in which to present empirical evidence to the contrary.[10]

In its decision, entered March 14, 1977, the court (Judge Wilkey dissenting) upheld the orders of the Board. The basic premise of the court appears to be that the subsequently initiated investigation in Docket 29000 renders the arguments of the NARUC and the California PUC abstract and theoretical and that, therefore, no justiciable case or controversy has been presented. The lower court at no time addressed the issue of the Board's underlying jurisdiction to issue the orders and focused on what it termed the "dicta" of the Board in prematurely announcing its attitude as to the nature of air service at Tahoe. Although specifically recognizing the lack of factual basis for the Board's analysis, the court apparently found no controversy resulting from the Board's basing its jurisdiction and subsequent actions on pure conjecture.

REASONS FOR GRANTING THE WRIT

The petition should be granted in order that this Court may correct the erroneous and precedentially dangerous decisions of the Board and the court below.

The result reached by the lower court simply does not address the issues before it, nor can that result be squared with sound legal reasoning. Rather, the court has not even considered whether the Board's rulings were based on insufficient evidence of jurisdiction and insufficient evidence to support the substance of those rulings. By interpreting the petitioners' objections as relating solely to specific language used by the Board and through classifying this language as "dicta," the court has skirted the underlying

[10]Order 76-3-114, reprinted as appendix E to the Petition for Writ of Certiorari, pages 45-54, at 49.

issues before it and determined that no real case or controversy exists. Contrary to the interpretation of the court below, the petitioners, including the NARUC, were not objecting to any specific language used by the Board, but to the import of that language, *viz.:* the Board has jurisdiction over the matter, certain restrictions should be imposed on the carriers, and the California PUC can no longer regulate Tahoe service. Indeed, from the language of the Board's orders, it is difficult to ascertain exactly what is alleged as a basis for jurisdiction and what constitutes the legal authority for the substance of the Board's action. The unsupported statement that "air service at Lake Tahoe is interstate in nature by definition" only serves to point out the arbitrary methodology used by the Board in fashioning its orders.

However, a careful analysis of the Board's orders does permit the reader to glean the general thrust of its view of the law under which it operates and, of more immediate importance, the effect of this view on the California PUC, the carriers and numerous intrastate passengers:

> 1) Because the Board considers that a *de minimis* number of passengers who commence and terminate their air travel in California may cross the state line into Nevada, the Board has jurisdiction over the entire flight and over service provided those passengers travelling entirely intrastate;
>
> 2) Because of the considerations which allegedly give the Board jurisdiction, certain substantive restrictions must be imposed on these flights, even though the restrictions affect intrastate passengers;
>
> 3) Because of the Board's unsupported views, the flights are already interstate flights and the California PUC is precluded from regulating air service provided to passengers who may never cross the state line; and
>
> 4) Because the Board does not know how many Tahoe passengers, if any, are actually moving in interstate commerce, the Board has instituted a proceeding to ascertain the facts.

When compared to the plain language of Sections 101, 401, and 416 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301, 1371, and 1386, these conclusions constitute a complete and utter disregard of proper administrative procedure and of the statute under which the Board operates.

Section 1371 of title 49 requires that "No *air carrier* shall engage in any *air transportation*" without a certificate authorizing it "to engage in *such transportation*" [emphasis added]. Section 1386(b)(1) allows the Board authority to exempt any "air carrier" from the subchapter under certain circumstances. Section 1301(3) defines "air carrier" as "any citizen . . . who undertakes to engage in air transportation." Section 1301 (10) defines "air transportation" as "interstate, overseas, or foreign air transportation." "Interstate air transportation," in turn, is defined in Section 1301(21) as "the carriage by aircraft of *persons* [emphasis added] or property as a common carrier . . . by aircraft, in commerce between . . . (a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States or the District of Columbia."

Thus the Act, on its face, requires only that an "air carrier" must have a certificate authorizing "air transportation" or be exempted from that requirement under Section 1386(b)(1). Yet that certificate, although issued to a carrier under the Board's jurisdiction, cannot authorize more than the performance of "air transportation." The Board has no jurisdiction to authorize, prevent or restrict

anything but "air transportation" and such other aspects of the carrier's business as are specifically covered by statute.[11]

The carriage of "persons" between points in different states is "air transportation"; the carriage of persons between points in the same state is not. It is true that any carrier which provides, in any part, "interstate air transportation" is subject to certification or exemption; however, this cannot, in and of itself, give the Board jurisdiction to regulate totally intrastate service provided by a certificated carrier.

On any given AirCal or PSA flight, there may be a mixture of passengers — those ultimately destined for Nevada and those who will remain in California and never leave the state. Neither AirCal nor PSA could, by definition, provide this latter category of passengers with "air transportation" even if other persons on board the same flight continued into Nevada on their own and could arguably be considered "in the stream of interstate commerce." Thus the Board cannot assert jurisdiction over an entire flight simply because it alleges that a *de minimis* number of passengers on that flight are possibly interstate passengers.[12] Nor can any statements of the Board concerning the nature of air traffic at Tahoe form a legitimate basis for the substantive restrictions imposed where those restrictions affect intrastate air transportation or the California PUC's power to regulate such transportation.

The arguments condemning the procedure used by the Board cannot be better expressed than in Judge Wilkey's dissent:

[11]For example, 49 U.S.C. Section 1377 empowers the Board to require "air carriers" to keep and submit reports and financial records.

[12]This principle has been implicitly recognized for years in the dual fare structure in effect on other combined interstate/intrastate air transportation in the state of California.

> Anyone familiar with principles of judicial review of administrative agency action would have thought that the present total absence of a factual basis for the Commission's [sic] action was a vice calling for the action to be set aside, not a virtue inducing the Court to sustain agency action while the supporting facts are gathered over a period of years.[13]

And, although the NARUC has noted the difficulty of separating the jurisdictional from the substantive rulings in the Board's orders, the issue remains that the Board did not base its understanding of either on any facts in its possession.

It may well be that, upon ascertaining a reasonable estimate of the "mix of interstate and intrastate passengers," the Board will be able to devise a reasonable dual regulatory system for service at Tahoe. This, of course, would require a legal conclusion, based on facts of record, that some definite portion of the service at Tahoe is "interstate air transportation." Even then it is doubtful that the Board could assert jurisdiction over that other portion of service which is purely intrastate. However, at the present time, the Board has no power whatsoever to issue substantive orders which adversely affect the people of California, the California PUC or any other party before it.

An agency may have the power to investigate and to establish facts in support of its jurisdiction to take substantive action, *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 90 L. Ed. 614, 66 S. Ct. 494 (1946). This is what the Board is allegedly attempting to do in Docket 29000. However, the NARUC finds no support for the proposition that an agency may make substantive rulings, adversely affecting parties, without any evidence of its authority to do so. Indeed, the cases which have even

[13]Dissenting opinion of Judge Wilkey, reprinted at appendix A to the Petition for Writ of Certiorari, at pages 8-9.

touched on this issue serve as bold warning that such activity will not be tolerated. In *North Carolina v. United States*, 325 U.S. 507, 89 L. Ed. 1760, 65 S. Ct. 1260 (1945), this Court succinctly stated the principle that "the Interstate Commerce Commission is without authority to supplant a state-prescribed intra-state rate unless there are clear findings, *supported by evidence* [emphasis added], of each element essential to the exercise of that power by the Commission." 325 U.S. at 511.

> The insistence that the Commission make these jurisdictional findings before it undertakes to act . . . gives added assurance that the local interests for which Congress expressed its solicitude will be safeguarded. *Yonkers v. United States*, 320 U.S. 685, 691-2, 88 L. Ed. 400, 404, 64 S. Ct. 327 (1944).

Whether the Board's view as to the "nature of air service at Tahoe" is the ground for its jurisdiction or for its substantive ruling, it most certainly is not "dicta." The lower court's decision ignores the well-established principle that an agency must base its jurisdiction and its substantive orders on concrete evidence. In this regard, the decision of the lower court is so alien to this Court's prior rulings as to amply warrant the granting of California's Petition for a Writ of Certiorari. And, aside from the direct injury that this decision inflicts upon the petitioner and other parties, the mere existence of such dangerous precedent in administrative law should constitute good cause for this Court to invoke its discretionary jurisdiction. Indeed, the facts as set forth by the petitioner and by the NARUC, when viewed in light of the applicable statutes and case law, render this case appropriate for summary reversal. *Ewing v. Gardner*, 341 U.S. 321, 95 L. Ed. 968, 71 S. Ct. 684 (1951).

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be granted, and the order of the United States Court of Appeals for the District of Columbia should be summarily reversed and remanded with instructions to annul and set aside the Board's orders.

Respectfully submitted,

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IN THE

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v.

CIVIL AERONAUTICS BOARD, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT AIR CALIFORNIA IN SUPPORT OF CERTIORARI

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BRIEF OF RESPONDENT AIR CALIFORNIA IN SUPPORT OF CERTIORARI

Under the provisions of Rule 21(6) of this Court's Rules, respondent Air California, an intervenor in the court below, supports the petition of the People of the State of California and the California Public Utilities Commission for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 14, 1977.

STATEMENT

Respondent Air California provides scheduled air service between various points within the State of California. Its routes and fares are regulated by petitioner California Public Utilities Commission, as are those of another intrastate carrier, Pacific Southwest Airlines (PSA). This proceeding is concerned with a conflict between the action of the California Commission in granting these carriers certain routes within the State of California and action of the respondent Civil Aeronautics Board in granting them certain exemptions.

In February 1975, the California Commission authorized Air California and PSA to provide service between South Lake Tahoe, California, and a number of other California points. Pursuant to this authorization, Air California inaugurated daily single-plane service between South Lake Tahoe, on the one hand, and Oakland, San Jose, San Francisco and Orange County, on the other, with connecting service to other points on its system. PSA began providing Lake Tahoe-Los Angeles and Lake Tahoe-Burbank single-plane service and connecting service between Lake Tahoe and San Diego.

In providing these services to and from Lake Tahoe, Air California and PSA wished to be able to attract passengers who might be going to, or coming from, places on the Nevada side of the Tahoe Basin. Lest the solicitation of such traffic be thought to jeopardize their status as intrastate carriers, both airlines applied to the Civil Aeronautics Board for exemptions permitting them to offer "interstate air transportation" on their intrastate services to and from Lake Tahoe. (The Board had previously granted such an exemption to a

State-certificated Lake Tahoe carrier that has since gone out of business.)

In June 1975, the Board granted Air California and PSA the requested exemptions, subject, however to certain conditions. Air California was restricted against holding out any Lake Tahoe service except to and from Oakland and San Jose, and PSA was limited to Lake Tahoe-Los Angeles and Lake Tahoe-Burbank service. The Board stated that these restrictions "are necessary because, in our view, air service at Lake Tahoe is interstate in nature by definition" (Petition, App. 29). The agency did not explain why this view of the character of Lake Tahoe service required the restrictions it imposed.

Adherence to the restrictions that the Board attached to its exemptions would have precluded Air California from continuing to hold out its direct Lake Tahoe-San Francisco and Lake Tahoe-Orange County services and all of its Lake Tahoe connecting services, and would require PSA to discontinue holding out Lake Tahoe-San Diego connecting service. For this reason, Air California and the California Commission sought reconsideration of the Board's order. The Board, however, reaffirmed its decision (Petition, App. 41-42).

Rather than eliminate important State-authorized air services, Air California elected to forgo the benefits of the Board's exemption. Consequently, Air California continues to provide the pattern of service it initiated in early 1975, without holding out the availability of its services to passengers traveling to and from Nevada. PSA, on the other hand, decided to avail itself of the Board's exemption, and it offers its Lake

Tahoe services to interstate passengers. As a result, it was obliged to cease holding out the Lake Tahoe-San Diego services authorized by the California Commission.

The California Commission petitioned the Court of Appeals for the District of Columbia Circuit for review of the Board's decision. It contended that the restrictions imposed by the Board in its exemption order infringed upon the State's exercise of its regulatory jurisdiction, and that the sole ground cited by the Board for imposing those restrictions—that "air service at Lake Tahoe is interstate in nature"—was without legal or factual support. Air California intervened on behalf of the California Commission's position.

In its decision the court below acknowledged that, in making its finding on the nature of air service at Lake Tahoe, "the Board spoke too soon and too loosely" (Petition, App. 7). The court nevertheless affirmed the agency's order. Noting that the Board had subsequently instituted an evidentiary proceeding in which a record as to the nature of Lake Tahoe service would presumably be developed, the court concluded that the Commission's appeal "is not timely. The issue is presently too theoretical and abstract" (*ibid.*).

ARGUMENT

The court below affirmed an action of a federal regulatory agency on the apparent ground that the absence of an administrative record precluded effective judicial review. In so doing, the court transformed one of the very bases for challenging the agency's action—lack of evidentiary support—into a reason for sustaining it. This ruling placed the lower court in direct con-

flict with governing decisions of this Court on the requirements of administrative adjudication and on the timeliness of judicial review. Grant of the petition for a writ of certiorari to review the decision below is plainly called for.

1. On its face, the decision below represents a rather clear departure from the usual course of judicial proceedings. While the lower court recognized that there was no evidentiary support for the Board's crucial finding of fact, it nevertheless *affirmed* the Board's order. To recapitulate: the agency action challenged in this proceeding was the Board's imposition of severe restrictions on its grant of exemption authority to two intrastate airlines—restrictions that would force these carriers to discontinue certain of their State-authorized services in order to obtain the benefits of the federal exemption. The sole basis cited by the Board for imposing these onerous restrictions was a finding that "air service at Lake Tahoe is interstate in nature by definition."

Neither in its order nor before the court below did the Board ever provide any factual support for that finding. What it did do, nine months later, was to institute a *Lake Tahoe Service Investigation* in which, it said, the parties could attempt to disprove its view as to the nature of air service at Lake Tahoe (Petition, App. 49-50). The Court of Appeals acknowledged that the Board had made its finding before it had any factual basis for doing so, and the court even granted that the Board's approach "suggests a predisposition that might lead observers to question the bona fides of the now pending inquiry into Lake Tahoe air service" (Petition, App. 6). In spite of these admitted defects

in the agency action under review, the court placed its imprimatur on the Board's decision by entering a judgment of affirmance.

In thus excusing the Board's failure to justify the action it took, the decision below was in direct conflict with a long line of decisions by this Court, perhaps best exemplified by *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947). There the Court summarized the applicable law to be

> that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. *If those grounds are inadequate or improper, the court is powerless to affirm the administrative action* * * *. [332 U.S. at 196; emphasis supplied.]

Having recognized that the grounds for the Board's decision were inadequate and improper, the lower court was "powerless to affirm the administrative action." Review by this Court is thus warranted, not only because the decision below cannot be reconciled with governing decisions of this Court, but also because the lower court's action in excess of its power calls for the exercise of this Court's supervisory authority over the federal court system.

2. The court below refused to review the Board's decision on the merits because, it declared, "The issue is presently too theoretical and abstract" (Petition, App. 7). The effect of the Board's imposition of the contested restrictions was hardly "theoretical" or "abstract." The Board explicitly directed the intrastate carriers to delete certain schedules they had been au-

thorized to operate by the California Commission (Petition, App. 29, n. 9). Compliance would have required these carriers to ignore their State-imposed service obligations, and in fact did cause PSA to abandon one of its State-authorized services. (Air California was able to avoid the discontinuation of such services only by forgoing the benefits of the Board's exemption.)

This Court held in the landmark case of *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-49 (1967), that an agency action is ripe for review when it "has been formalized and its effects felt in a concrete way by the challenging parties." The Board left no doubt that its action was a definitive one with which it expected compliance (see Petition, App. 29-30). Furthermore, the very real and practical effects of the Board's order have been felt for two years, and will continue to be felt indefinitely, not only by the California Commission whose regulatory actions have been frustrated, but also by the affected airlines and the traveling public. The lower court did not—nor could it—find otherwise.

The lower court found the Board's action unripe for review, not because that action lacked finality or had no practical impact, but because the Board later instituted an evidentiary proceeding that might generate support for the agency action (Petition, App. 6-7). In other words, the manifest lack of an evidentiary foundation for the Board's decision, which should have moved the court to *invalidate* the agency's order, became an excuse to avoid reviewing it—indeed, to *affirm* it. Such resort to the "ripeness" doctrine to forestall review of a formal, concretely prejudicial agency action cannot be squared with the salutary principles

laid down in the *Abbott Laboratories* case. Intervention by this Court is plainly called for.

CONCLUSION

The questions raised by the decision below go to the very heart of the federal administrative process. Here an agency has been allowed to shield a plainly defective action from judicial scrutiny simply by promising to substantiate it later on. If that is a course of conduct that is open to any federal agency, what remains of the requirements of reasoned administrative adjudication? And what remains of the parties' right to effective judicial review? These are important questions that deserve the attention of this Court. The petition for a writ of certiorari should be granted.

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CIVIL AERONAUTICS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT REPLY BRIEF OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PETITIONERS, AND OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, RESPONDENT

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Pursuant to Rules 24(4) and 39 of this Court's Rules, petitioners, the People of the State of California and the Public Utilities Commission of the State of California (California), and respondent in support of petitioners, the National Association of Regulatory Utility Commissioners (NARUC), hereby reply to the Brief for the Civil Aeronautics Board (CAB),

respondent, in Opposition to California's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on March 14, 1977. The facts and history of his matter are set forth in detail in California's petition filed June 11, 1977, and in the supporting memorandum of respondent NARUC, filed July 29, 1977.

GROUNDS FOR REPLY

This reply is made necessary by two elements of the CAB's Brief in Opposition: (1) allegation of new facts by the CAB apparently intended to show that the CAB's orders challenged herein have not had "effects felt in a concrete way by the challenging parties," and (2) misstatement of the question presented by California's petition.

ALLEGATION OF NEW FACTS

For the first time in the course of this controversy, the CAB in its Brief in Opposition alleges that "PSA and Air Cal are now operating precisely as they were before the Board's orders: within the jurisdiction of the PUC"; and that, although such operations are in direct contravention of exemption authority granted to these carriers by the orders challenged herein, "There is no reasonable likelihood that the Board will initiate enforcement proceedings against the carriers at this time." (CAB Brief 5, 6.)[1] In view of these

[1]The CAB cites and attaches as an appendix to its brief a December 1976 letter from PSA reporting its intention to operate out of conformity with its CAB-granted exemption authority and

alleged facts, the CAB seeks shelter under the dictum of *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 18 L.Ed.2d 681, 691, 87 S.Ct. 1507 (1967), that judicial review may be postponed until "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." CAB Orders 75-6-135 and 75-9-78, of which review is sought herein, granted and modified, respectively, limited exemption authority to provide air transportation as defined in Section 101 of the Federal Aviation Act of 1958, 49 U.S.C. 1301. These were, most assuredly, "formalized administrative decisions," and they have been rendered no less formalized by the responsible administrative agency's failure to enforce them.

Nor is it convincing to argue that the effects of the CAB orders have not been "felt in a concrete way" merely because the subject carriers have failed to comply with them. Although the CAB decorously characterizes the carriers as having "chosen not to limit their operations in the manner set forth in their exemptions" (CAB Brief 5), according to the CAB's interpretation of applicable law these carriers "are *now* engaged in air transportation without Board authority" (Order 75-6-135, Pet. App. 29). Such conduct if the CAB's orders are valid, violates the Federal Aviation Act and subjects the carriers to civil and criminal penalties, possibly amounting to $1,000

asserting its belief that such conduct is lawful, "[a]t least until the legal situation is clarified and determined in the pending court case." The CAB does not go so far as to suggest that this letter relieves PSA of any criminal or civil liability to which the Board's orders might subject it.

and $2,000 per day of violation, respectively. Federal Aviation Act Sections 901(a)(1), 902(a), 49 U.S.C. 1471(a)(1), 1472(a).

In the case of *Frozen Food Express v. United States,* 351 U.S. 40, 100 L.Ed. 910, 76 S.Ct. 569 (1956), this Court ruled that an ICC order designating motor vehicles carrying certain commodities, but not others, as exempt from permit requirements was in substance a declaratory order, "which touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done." *Id.* at 44, 100 L.Ed. at 915. This Court held that the ICC order

> "warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties. . . . The determination made by the Commission is not therefore abstract, theoretical, or academic."

Id. at 44, 100 L.Ed. at 914-15. See also *Natick Paperboard Corp. v. Weinberger,* 498 F.2d 125, 128 (1st Cir. 1974). The same principle was stated yet more concisely by Justice Black in *Pennsylvania Railroad Co. v. United States,* 363 U.S. 202, 205, 4 L.Ed.2d 1165, 1168, 80 S.Ct. 1131 (1960):

> "[W]hile a mere 'abstract declaration' on some issue by the Commission may not be judicially reviewable, an order that determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable. Rochester Tel. Corp. v. United States, 307 U.S. 125, 131, 132, 143, 83 L.Ed. 1147, 1152, 1153, 1159, 59 S.Ct. 754."

In this case the CAB has placed the carriers at the risk of incurring substantial civil and criminal penalties. Its orders have determined rights and obligations from which legal consequences flow. That the CAB has chosen, with an eye to the ongoing process of judicial review, not to enforce its orders cannot change the character, and the susceptibility to judicial review, of those orders.

In the very case cited by the CAB, *Abbott Laboratories v. Gardner, supra,* this Court referred approvingly to the *Frozen Food Express* decision, and then reached a conclusion directly applicable to this case:

> "The Government further contends that the threat of criminal sanctions for noncompliance with a judicially untested regulation is unrealistic; the Solicitor General has represented that if court enforcement becomes necessary, 'the Department of Justice will proceed only civilly for an injunction . . . or by condemnation.' We cannot accept this argument as a sufficient answer to petitioners' petition. This action at its inception was properly brought and this subsequent representation of the Department of Justice should not suffice to defeat it."

387 U.S. at 154, 18 L.Ed.2d at 694-95.

California and the NARUC believe that orders of the CAB, as of any Federal agency, are deserving of respect. Petitioners have pursued their appellate rights presuming the validity and effectiveness of the orders here in question, if found to have been duly issued. The lack of adherence to the rule of law here demonstrated by the carriers and by the CAB itself

ought not to be permitted to frustrate the process of judicial review.

THE QUESTION PRESENTED

In its Brief in Opposition the CAB defines the question presented as whether the Court of Appeals properly declined to consider petitioners' "challenge to a preliminary statement" by the CAB. (CAB Brief 2.) The CAB states that petitioners sought "review of the Board's 'view' that 'air service at Lake Tahoe is interstate in nature by definition.'" (CAB Brief 4.)

California and the NARUC respectfully point out that the question presented in the petition filed herein is whether the Court of Appeals properly affirmed certain orders of the CAB. (Pet. 2.) The Court of Appeals itself recognized that the validity of CAB orders was the matter at issue. (Pet. App. 5.) This Court has not been asked to reach a final resolution of what the CAB calls "the jurisdictional question"—whether, and if so to what extent, air travel to Lake Tahoe from other California points is air transportation as defined by the Federal Aviation Act. Rather, the central issue before this Court is whether an appeals court may properly sustain the validity of an administrative agency's orders, based upon an admittedly inadequate record and creating risk of substantial civil and criminal penalties, on the grounds that the agency, under the pressure of an appeal, has later initiated a separate proceeding to review the evidentiary question.

CONCLUSION

As discussed above, the question presented by petitioners is neither abstract, theoretical nor academic. The CAB's after-the-fact initiation of an investigation and its adoption of a non-enforcement policy cannot affect the validity or invalidity of its orders challenged herein.

Dated, September 12, 1977.

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